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No. 49975-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

State of Washington, Respondent

v.

Sergey Fedoruk, Appellant.

APPELLANT'S REPLY BRIEF

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Introduction

The trial judge worried that Fedoruk was not competent during the trial. On appeal, the government fails to address the trial court's admission that the court questioned Fedoruk's competency prior to the verdict. Despite questions about Fedoruk's competence, the court did not engage in a colloquy or have Fedoruk evaluated. The court's admission, and its failure to act on its suspicion that Fedoruk was no longer competent, require that the case be remanded for a new trial.

The conviction should also be reversed because the signs of Fedoruk's loss of competency were obvious well before the trial court admitted it questioned competency. Fedoruk collapsed in the courtroom and the interpreter could not understand his ramblings. The trial court erred by failing to ensure that Fedoruk was competent after at least three compelling signs he had lost competence: 1) counsel raised the issue; 2) Fedoruk's behavior changed markedly; and 3) Fedoruk showed he could not communicate with counsel.

Fedoruk was also wrongly denied a continuance and wrongly shackled. The easy issue here, however, is that the government does not, and cannot, defend the trial court's failure to ensure Fedoruk was competent when the court itself admitted it questioned competency. Where the court questions a defendant's competency during trial, it must make a record that it took steps to ensure that the defendant continued to have the competence to stand trial. The trial court did not do so here, and the case must be remanded for a new trial.

A. Five facts that require reversal

“No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” RCW 10.77.050. A trial court must order a qualified expert or professional to evaluate and report on the defendant’s mental condition “[w]hen . . . there is reason to doubt his or her competency.” RCW 10.77.060(1)(a).

Since the law is clear, and since the trial court did nothing to evaluate Fedoruk’s competency during trial, this case turns on whether there was reason to doubt Fedoruk’s fitness. There was.

1. The trial court stated that “conduct that might have caused me to question his competency at all really didn’t occur until we were reading jury instructions.” RP 9/30/16 at 107. The court thus admitted that conduct that caused the court to question competency occurred during trial.
2. The trial court stated that Fedoruk’s behavior prior to the verdict prevented him from being “able to consult with his attorneys . . .” RP 9/30/16 at 107. The trial court knew Fedoruk could not communicate with counsel during trial.
3. Fedoruk’s counsel raised competency, in part because Fedoruk was “chanting stuff in some indecipherable Russian.” 9/29/16 at 16. The court, however, responded that Fedoruk was simply “upset.” 9/29/16 at 10, 17. The

court also emphasized that the trial was almost over after two weeks. 9/29/16 at 17. The court ignored defense counsel's concerns and pushed trial through to the end.

4. At the time of the verdict, the court found that Fedoruk had not been taking his medications for at least 24 hours. CP 354. The court knew, because it had entered an order for forced medication, that Fedoruk would not be competent if he was not medicated. The trial court ignored the import of its own forced medication order and failed to ensure that Fedoruk was receiving all the medication that was required for him to maintain his competence.
5. Immediately after the verdict, the court found Fedoruk lacked competency. There was no significant change in Fedoruk's behavior from Thursday, before closing argument; Friday, before the verdict was read; and Friday, immediately after the verdict was read, at which point the trial court finally admitted that Fedoruk was likely not competent.

The court's own statements show that that it questioned Fedoruk's competency prior to the verdict, at least as early as during discussions about the jury instructions. The trial court believed that Fedoruk was not competent when the verdict was rendered because within seconds after the verdict was read the court itself felt that Fedoruk could not communicate with counsel and thus was not competent. The trial

court knew Fedoruk needed to take medications to be competent and the trial court knew that Fedoruk was not taking his medications. CP 354.

The trial court has a constitutional obligation, under the due process clause, to undertake an independent judicial inquiry when the court has reason to doubt competency. *Pate v. Robinson*, 383 U.S. 375 (1966). During trial, the record clearly shows, and the court admitted, that there was reason to question competency. But the court did nothing to ensure that Fedoruk was competent. Failure to act when the court itself questions competency is an abuse of discretion that requires reversal.

B. Failure to ensure Fedoruk’s competency after defense counsel raised competency was an abuse of discretion

On Thursday, September 29, 2016, during a break, Fedoruk was placed him in leg irons and belly chains. 9/29/16 at 11. His counsel told the court that he “couldn’t discuss anything, really” with Fedoruk. 9/29/16 at 12. Fedoruk removed his translation device. 9/29/16 at 12. In other words, counsel could no longer communicate with his client because of Fedoruk’s mental illness. That meant he was not competent. RCW 10.77.010(15) (defendant is not competent if he is incapable of assisting in his defense due to a mental defect).

Counsel raised competency. 9/29/16 at 16. Counsel was “concerned about his ability to assist at this point.” 9/29/16 at 16. Fedoruk was “chanting stuff that is some indecipherable Russian . . .” *Id.* When counsel tried “to explain or get into the testimony of the last

witness, the reaction was just pure anger and not real focused.” *Id.* As a result, counsel was “concerned about his competence, at this point.” *Id.*

The court did not defer to counsel or ensure that Fedoruk could communicate with counsel. Instead, without any colloquy, it determined that Fedoruk was “emotionally upset.” 9/29/16 at 17. That was an abuse of discretion.

C. *Drope* and *Anene* control

The government distinguishes *Drope* and *Anene* on two bases: first, those defendants attempted suicide; and second, the government complains that Fedoruk’s counsel failed to make a record of Fedoruk’s mental illness. Respondent’s brief at 27-29. Neither of these arguments is persuasive.

The question addressed in *Drope* and *Anene* is whether trial may proceed where a defendant is unable to assist in his defense because of a mental defect. The genesis of the inability to assist is distinct from the legal principle. Whether Fedoruk was unconscious for part of the trial (he was); was unable to speak with counsel because he removed his translation device and was speaking indecipherable Russian (he did and was); or whether he was incapacitated because of attempted suicide (thankfully, he was not), the issue is not the form in which the mental illness manifests, but whether Fedoruk could assist in his defense. He could not.

In *State v. Anene*, 149 Wn. App. 944, 956, 205 P.3d 992 (2009), the trial could not continue where the defendant was “clearly unable to assist

in his own defense.” *See also Drope v. Missouri*, 420 U.S. 162 (1975) (reversing trial court for failure to conduct competency evaluation where there were clear signs of mental illness). In *Anene* and *Drope*, the trial courts were reversed because they held that the defendants’ actions were intentional; here, however, the trial court admitted it did not even know whether Fedoruk “can or can’t control” his behavior. RP 9/29/16 at 55. Continuing with a criminal trial where the court admits that it is not certain if a defendant’s actions were in his control, where those actions were found to forfeit his right to assist in his defense, is an abuse of discretion.

Contrary to *Anene* and *Drope*, the court disregarded counsel’s concerns about competency. *See Drope*, 420 U.S. at 176–77 (defense counsel’s mere mention of the defendant’s mental problems was sufficient to bring the issue of competency to trial court’s attention); *Anene*, 149 Wn. App. at 956. While the trial court need not always defer to counsel, it cannot do what it did here, which is to overrule counsel’s concerns based on a sense that Fedoruk was upset when the signs of Fedoruk’s loss of competency were plain.

The trial court said it suspected he was not competent during trial, and that the court ordered an evaluation immediately after the verdict. RP 9/30/16 at 107. The verdict came on Friday, September 30. Argument on jury instructions occurred on Thursday, September 29.

There were many signs that led the court to question Fedoruk’s competency. As the parties began to consider the jury instructions,

Fedoruk became disruptive, speaking in incomprehensible Russian. 9/29/16 at 28-30. In response, corrections put him in belly chains. 9/29/16 at 29. Then Fedoruk began asking corrections not to tase him. 9/29/16 at 29-30. Court recessed at about 10:45. 9/29/16 at 35.

When court reconvened, at about 1:30, to finalize the jury instructions, Fedoruk spoke throughout, unintelligibly. 9/29/16 at 36-37. As the jury was about to return to the courtroom, Fedoruk stated that he would take "Ativan. I'll take Ativan." 9/29/16 at 38. The court told him "All right." 9/29/16 at 38. The trial court made no record to ensure he was medicated, or if Ativan was his only required medication.

About 15 minutes later, as the court went through the instructions with the jury, Fedoruk collapsed to the floor. 9/29/16 at 47. Fedoruk had hit his head on the table. 9/29/16 at 48. Fedoruk was crying and did not respond to counsel. 9/29/16 at 48. Fedoruk said he had lost consciousness. 9/29/16 at 49.

Fedoruk then began singing and chanting in Russian. 9/29/16 at 50. With his attorney could no longer communicate with him, and Fedoruk continued his singing and chanting, Fedoruk was removed from the courtroom. 9/29/16 at 50.

Even in the absence of the court's admission that these actions caused it to question Fedoruk's competency, these actions, combined with defense counsel's statement that communication with Fedoruk was no longer possible, 9/29/16 at 50, would require a competency evaluation.

The court knew well Fedoruk's rapid cycling between competency and lack of competency. Opening brief at 31-33. Fedoruk is no marginal case: his history of mental illness includes numerous findings of lack of competency in this matter and a prior NGRI. Opening brief at 4-5. Through a *Sell* hearing, as well as evaluations, the trial court knew that medication was critical to Fedoruk maintaining competency. Opening brief at 10-12; RP 9/30/16 at 108 (based on "prior history", court finds that forced medication is "critical and crucial to the Defendant's mental state").

There was no real difference in Fedoruk's behavior on Thursday, prior to closing arguments; on Friday, prior to the jury verdict; and on Friday, after the verdict, when the court determined Fedoruk was likely not competent and again ordered forced medication.

On Thursday, September 29, after being removed from the courtroom, Fedoruk was "lying down on the floor in the holding cell, refusing to get up; speaking in a very loud voice; indicating that he wished to return to jail." 9/29/16 at 94.

On Friday, September 30, prior to the verdict, the court announced that Fedoruk had "spent the night essentially without sleeping and mostly practicing boxing moves." 9/30/16 at 98, 99. Both of these observations prior to verdict give the trial court reason to doubt Fedoruk's competency.

Nor did anything change in Fedoruk's behavior from Friday before the verdict and Friday after the verdict. The court found that Fedoruk was not taking medications for at least 24 hours at this point. CP 354; 9/30/16

at 112. In ordering that Fedoruk be forced to take medication, the trial found that failing to medicate Fedoruk would “do him harm.” RP 9/30/16 at 116.

Given all the information the trial court had—past history, present behavior, defense counsel’s opinion, the court’s own suspicions about the loss of competency—the government’s reliance on cases like *Fleming* and *Lord* is misplaced. Respondent’s brief at 31. Those cases simply stand for the proposition that a trial court needs to have a substantial basis for questioning competency. Even if the trial court had not admitted it had such a basis, Fedoruk’s behavior, his failure to medicate, his counsel’s concerns, his counsel’s objections, and his history of serious mental illness and oscillations between competency and lack of competency make this matter quite different from cases where a motion was based on isolated incidents and where, as in *Lord*, the trial court observed counsel and the defendant communicating. *State v. Lord*, 117Wn.2d 829, 901, 822 P.2d 177 (1991).

Fedoruk’s counsel stated he could not communicate with his client and believed Fedoruk was no longer competent. Counsel moved for a mistrial. Despite the warning from counsel, as well as numerous, obvious signs that Fedoruk was no longer competent, the trial court forged ahead. Rather than consider Fedoruk’s competency, the court had him shackled and moved his interpreter away from him. The law instructs otherwise, and “once 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”

and “[f]ailure to observe procedures adequate to protect an accused’s right not to be tried while incompetent to stand trial is a denial of due process.” *In re Fleming*, 142 Wn.2d 853, 863, 16 P.3d 610 (2001)(internal citation and punctuation omitted).

D. The government’s arguments on issues other than competency similarly lack merit

The government argues that the court did not push through to the end of trial because of its calendar. Respondent’s brief at 38. But why else emphasize, when considering Fedoruk’s competency, that the case was “very close to completion of all the testimony after almost two weeks of trial”? RP 9/29/16 at 17. The trial court’s reaction to the Fedoruk’s loss of competency is understandable. The court, the jury, counsel and witnesses had gotten much of the way through the trial. But Fedoruk was no longer competent, no longer even conscious, RP 9/29/16 at 47. Understandable frustration at lost time does not trump the constitution.

The court of appeals held similarly in *Anene*. There, the trial court pushed on because there was a “jury here that’s heard two-thirds of the case . . . we’ve got scheduling, we’ve got other considerations than simply waiting for the defendant to show up to take the verdict. My conclusion is we’ll proceed with the trial.” 149 Wn. App. 949. That was error in *Anene*, and it is error here.

The government argues that Fedoruk was correctly removed from the court during critical stages of the trial. Respondent’s brief at 32-38. The government says that less-restrictive alternatives were not possible,

but fails to argue why a break to determine competency or to ensure medication compliance were not feasible, even required, alternatives. The government's argument on the remaining alternative, whether a short continuance would have been possible, is not convincing. Respondent's brief at 35. The government just argues that the illegal failure to grant a continuance, which required Fedoruk to miss a critical stage of his trial, did not help Fedoruk with his competency or his physical distress. *Id.* That, however, is reason for a longer continuance, not to banish a defendant from the courtroom for mental and physical issues that are beyond his control.

The government's argument on shackling is similar. Although the trial court admitted it did not know if Fedoruk's behavior was within his control and had questions about Fedoruk's competency, it chose physical restraints rather than ensuring medication compliance and ordering a competency evaluation. That decision abused the court's discretion.

E. The trial court erred when it applied to the right to be present test rather than the competency rules

To be competent, a defendant must have the capacity to (1) understand the proceedings and (2) assist in his own defense. RCW 10.77.010(15). "No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." RCW 10.77.050.

The issue of a defendant's right to be present involves a different standard. A defendant may be removed from trial where, after being

warned, his conduct is “severe enough to justify removal” and removal is the least-restrictive alternative. *State v. Chappel*, 145 Wn.2d 310, 320, 36 P.3d 1025 (2001).

As outlined in the opening brief, opening brief at 25-28, although Fedoruk’s lawyer told the court that he “couldn’t discuss anything, really” with Fedoruk, the trial court viewed Fedoruk’s behavior as an issue of “composure.” RP 9/29/16 at 11, 12. Fedoruk removed his translation device. RP 9/29/16 at 18. Fedoruk sat in his chair, mumbling. RP 9/29/16 at 12. The court noted that Fedoruk’s behavior was “concerning to all, including the corrections staff.” RP 9/29/16 at 14. The court was so concerned about Fedoruk’s behavior that he had him placed in restraints and, over counsel’s objection, moved the interpreter away from him. 9/26/16 at 15.

Fedoruk’s counsel raised his competency, in part because he was “chanting stuff in some indecipherable Russian.” RP 9/29/16 at 16. When counsel tried to talk about the trial, he was unable to have a meaningful conversation with Fedoruk. RP 9/29/16 at 16. The court, however, responded that Fedoruk was simply “upset.” RP 9/29/16 at 17. The court also emphasized that the trial was almost over after two weeks. RP 9/29/16 at 17.

Rather than consider competency, the trial court emphasized something irrelevant to the competency determination: that “Fedoruk is currently calm, and I think we can continue to proceed.” 3/29/16 at 17. “Composure” and “calmness” go to presence, not competency. Despite

this, the trial court admitted it questioned Fedoruk’s competency during trial, while the parties were putting together jury instructions. RP 9/30/16 at 107. The court did not consider that important because it was trying to determine if Fedoruk would have future “meaningful participation” in the trial. RP 9/29/16 at 54. But in Washington, an accused may not be “tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” RCW 10.77.050. In applying the wrong legal test after Fedoruk’s counsel raised competency—and after it admitted it had reason to doubt prior to verdict—the trial court abused its discretion.

Conclusion

The verdict should be reversed and the case remanded for a new trial.

Respectfully submitted on December 22, 2017

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Certificate of Service

On December 22, 2017, I served all parties by electronic service,
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I declare under penalty of perjury of the laws of the State of
Washington that the foregoing is true and correct.

Dated December 22, 2017 in Seattle, Washington.

s/Harry Williams IV, WSBA #41020

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