

FILED
Court of Appeals
Division II
State of Washington
4/30/2018 1:20 PM
No. 51073-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

WADE ALEXANDER ROBINSON,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 16-1-01024-7
The Honorable Stephanie Arend, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred and abused its discretion in denying Wade Robinson's motion to withdraw his guilty pleas without first holding a competency hearing meeting all of the requirements of RCW Title 10.77.
2. The trial court failed to make a proper determination regarding Wade Robinson's competency.
3. The trial court erred in concluding that the testimony of the evaluating psychologist "does not support a finding that the defendant's plea was not voluntary" and that "nothing ... raised any concerns as to his competency" to plead guilty.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court err when it found that Wade Robinson did not present substantial evidence that he was mentally incompetent when he entered his plea based not on the opinion of the psychologist who evaluated Wade Robinson but rather on testimony and observations of laypersons? (Assignments of Error 1, 2, & 3)
2. Did the trial court err in denying Wade Robinson's motion to withdraw his plea without first ordering the mandatory competency hearing under RCW 10.77.060, where

Robinson presented substantial evidence that he was mentally incompetent when he entered the plea, and where a trial court is required by statute to either grant such a motion or convene a formal competency hearing whenever a defendant moves to withdraw a plea on the basis that he was incompetent at the time the plea was entered? (Assignments of Error 1, 2, & 3)

III. STATEMENT OF THE CASE

The State charged Wade Alexander Robinson by Information filed March 9, 2016, with four counts of first degree incest, two counts of third degree rape of a child, two counts of third degree child molestation, and two counts of third degree assault. (CP 4-10) The State also alleged that Robinson used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the offenses. (CP 4-10) The alleged victim, P.R., is Robinson's daughter. (CP 1)

Robinson's wife, Tiffany Robinson, was charged as a co-defendant. (CP 1, 4) On January 29, 2017, Wade Robinson discovered Tiffany's lifeless body in their home. Tiffany had

committed suicide. (02/01/17 RP 3, 6; CP 85-86)¹ The loss of his wife left Robinson devastated, and his grief was compounded by the fact that he could not see his children and that his family was being torn apart by the charges leveled against him. (02/01/17 RP 5; 09/08/17 RP 5, 8)

Nevertheless, Robinson agreed to enter an Alford/Newton plea to an amended Information charging two counts of second degree incest, and to a joint recommendation of 36 months confinement (an exceptional sentence above the standard range). (CP 65-66, 68-79) At the plea hearing held on March 27, 2017, the trial court questioned Robinson and his attorney about Robinson's decision to plead guilty. Defense counsel informed the court that he and Robinson had discussed all aspects of the plea and that he believed Robinson understood the nature of the charges and the consequences of his decision. (03/27/17 RP 4-5) Robinson also answered affirmatively when asked if he understood the plea form, the charge and their elements, his sentence, and the consequences of pleading guilty. (03/27/17 6-14) The trial court found that the plea was knowing, voluntary and intelligent, and it

¹ The transcripts will be referred to by the date of the proceeding contained therein.

accepted Robinson's guilty plea. (03/27/17 RP 14-15)

Robinson subsequently filed a motion asking that he be allowed to either withdraw his plea or be given a competency hearing. (CP 84-96) Robinson asserted that he was so despondent and depressed over the unexpected death of his wife that he was rendered incompetent at the time of the plea hearing and could not fully understand or evaluate the consequences of his guilty plea. (CP 84-89) In support of the motion, Robinson submitted a declaration from psychologist Dr. Mark Whitehill, who evaluated Robinson on May 30, 2017. Dr. Whitehill found that Robinson is "acutely symptomatic and experiences severe levels of anxiety and depression as well as a post-traumatic stress reaction of moderate severity." (CP 96) Dr. Whitehill concluded, "[t]o a reasonable degree of psychological certainty," that Robinson's mental state two months prior to these findings (i.e., at the time that he entered the plea), was even more compromised and would have effectively rendered him incompetent to enter a plea." (CP 95)

The trial court held an evidentiary hearing before ruling on the motion to withdraw the plea. At the hearing, Dr. Whitehill reiterated his diagnosis, and explained that while Robinson's symptoms and emotions were self-reported, the psychological tests

that he used to diagnose Robinson have built-in “validity scales” to ensure proper and accurate diagnoses. (08/18/17 RP 18, 20) In Dr. Whitehill’s opinion, the conclusion that Robinson was suffering from severe depression and anxiety was a valid and reliable result. (08/18/17 RP 24-25) Dr. Whitehill testified that Robinson’s mental state would have been even more compromised at the time he entered his plea, and likely would have impacted his cognitive capacities and his ability to make reasonable judgments. (08/18/17 RP 30-31)

Dr. Whitehill testified that Robinson’s compromised mental functioning may not have been obvious to lay persons. (08/18/17 RP 33-34) But in Dr. Whitehill’s opinion, Robinson’s capacity to understand and be fully present for decision-making, and his ability to knowingly and intelligently enter a plea, would have been significantly compromised. (08/18/17 RP 32-33)

Robinson also testified that his wife’s suicide left him “destroyed” and mentally “in a hole.” (09/08/17 RP 8, 10) He was overcome by fear and grief, and did not experience true mental clarity about his case until he spent time in solitary confinement after he entered his plea. (09/08/17 RP 11, 13, 18-19, 22-23) Having that time to focus and reflect allowed him to see that he was

not truly present and involved in the decision to plead guilty, and instead had just followed the advice of his family and defense counsel. (RP14-15, 24, 49, 68)

The State presented phone conversations between Robinson and family members recorded after the plea hearing. In those calls, Robinson explains why he thought it was in his best interest to take the plea, but says that he is feeling better and now believes that he can fight the charges and win at trial. (Exhs. P1, P4) Defense counsel also testified at the hearing, and expressed his belief that Robinson understood the plea and the consequences of the plea. (08/18/17 RP 86, 99) He testified that Robinson was engaged in the process and was able to express to counsel his concerns and hopes for the plea outcome. (08/18/17 RP 88-89, 90-91, 92) Counsel testified that Robinson gave him no reason to doubt his competency. (08/18/17 RP 103)

Without ordering a competency hearing, the trial court denied Robinson's request to withdraw his plea. (09/20/17 RP 16) The trial court relied primarily on defense counsel's testimony that he thought Robinson seemed competent, and on its own recollection of Robinson's demeanor at the plea hearing. (09/20/17 RP 11, 15) The trial court concluded that Robinson had not shown

any overt or obvious evidence of a manifest injustice requiring vacation of his conviction and plea. (09/20/17 RP 16; CP 351)

The trial court imposed the agreed-upon sentence of 36 months of confinement plus community custody and other terms and fines. (CP 315-18, 338-40; 10/26/17 RP 4, 10) Robinson timely filed a Notice of Appeal. (CP 331)

IV. ARGUMENT & AUTHORITIES

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); U.S. Const. amend. XIV.

Washington law affords greater protection by providing that “[n]o incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” RCW 10.77.050; Fleming, 142 Wn.2d at 862. 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); CrR 4.2. 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. 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, the defendant moved to withdraw his guilty plea, presenting undisputed testimony from a neurologist, a neuropsychologist, and a psychiatrist that he suffered from brain damage, bipolar mood disorder, and paranoid schizophrenia. Furthermore, one doctor concluded that the defendant was delusional and suffering from psychotic depression when he pleaded guilty. 144 Wn.2d at 271-72. Despite acknowledging that the defendant clearly suffered from brain damage, the trial court ruled that the defendant did not exhibit any signs of incompetency during the plea hearing and denied the motion. 144 Wn.2d at 280.

Our Supreme Court reversed, holding:

Here, despite substantial evidence calling Marshall's competency into question, the trial court denied the motion to withdraw the guilty plea absent the mandatory competency hearing required by RCW 10.77.060. We hold that 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 trial court had erred and reversal was required. 144 Wn.2d at 281.

In contrast, when an incompetency claim is not supported by substantial evidence, the defendant has not demonstrated a manifest injustice and the trial court may deny the motion without holding a formal competency hearing. For example, in State v. DeClue, the defendant's motion to withdraw his guilty plea was supported by only his own affidavit asserting that the numerous medications he was taking at the time of the plea interfered with his ability to understand and assess the consequences of pleading guilty. 157 Wn. App. 787, 794, 239 P.3d 377 (2010). Initially, this Court found that the trial court's act of first holding an evidentiary

hearing to learn about the possible effects of the defendant's medications and to determine if a legitimate question of competency existed, instead of immediately ordering a formal competency hearing, was not error. 157 Wn. App. at 794-95.

The DeClue Court then affirmed the trial court's denial of the motion to withdraw the plea, even without a formal competency hearing, because "DeClue presented no credible evidence that the medications affected his ability to understand the consequences of pleading guilty." 157 Wn. App. at 796.

Unlike DeClue, however, Robinson did present credible testimony from a trained psychologist to support his claim that he was incompetent at the time he entered his guilty plea. Just as in Marshall, Robinson moved to withdraw the guilty plea with expert evidence that he was incompetent when the plea was made. And like Marshall, at the time Robinson moved to withdraw the guilty plea, the court received substantial evidence in the form of a written report and verbal testimony, suggesting Robinson's incompetence.

Having received such substantial evidence when he moved to withdraw his plea, the trial court was required to order a competency hearing before denying Robinson's motion. As in Marshall, the court was required to either grant the motion to

withdraw or convene a formal competency hearing. But it did neither.

The burden was on Robinson to show a “manifest injustice” in order to allow withdrawal of the plea. Just as in Marshall, while the trial court heard evidence regarding competency, the hearing was a motion hearing, not a competency hearing. The court did not make any formal conclusion regarding Robinson’s competency, instead simply finding that his “appearance, demeanor [and] responses during the [plea] hearing” did not “raise[] any concerns as to his competency.” (CP 352) And the court merely concluded “that the defendant has not met the demanding burden of demonstrating that a manifest injustice has occurred. Dr. Mark Whitehill’s testimony does not change the Court’s opinion in this regard.” (CP 352)

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 10.77.060(1)(a).

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 of the court’s error, Robinson’s guilty plea must be vacated and his case remanded for a competency hearing. Marshall, 144 Wn.2d at 281-82.

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V. CONCLUSION

For the reasons set forth above, Robinson requests that this Court vacate his convictions and remand his case for a competency hearing.

DATED: April 30, 2018



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CERTIFICATE OF MAILING

I certify that on 04/30/2018, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Wade A. Robinson, DOC# 398252, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



STEPHANIE C. CUNNINGHAM, WSBA #26436

April 30, 2018 - 1:20 PM

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