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Court of Appeals
Division II
State of Washington
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NO. 51367-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN KEITH TERWILLEGER,

Appellant.

REPLY BRIEF OF APPELLANT,
BRIAN KEITH TERWILLEGER

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY
THE HONORABLE STEPHEN E. BROWN, JUDGE

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TABLE OF CONTENTS

I. ARGUMENT IN REPLY 1

 A. Mr. Terwilleger did not Forgo a Mental Health
 Defense. 2

 B. Mr. Terwilleger’s Trial Counsel Failed to Sufficiently
 Investigate a Mental Health Defense. 3

 C. Mr. Terwilleger’s Statements and Demeanor Evidenced
 his Inability to Speak Voluntarily with Police. 5

II. CONCLUSION..... 6

TABLE OF AUTHORITIES

State v. A.N.J.,
168 Wn.2d 91, 225 P.3d 956 (2010)..... 3

State v. Fedoruk,
184 Wn. App. 866, 339 P.3d 233 (2014)..... 3, 4

I. ARGUMENT IN REPLY

In September 2016, Brian Terwilleger crashed his vehicle into a parked car for no apparent reason. He and his girlfriend, Alicia Sackrider, were visiting her uncle, Jeff Holloway. 7/25/17 RP at 114, 141. Mr. Terwilleger injured Mr. Holloway, who was standing on the other side of the parked car. *Id.* at 149-50. Prior to this incident, the two men got along well and had no disagreements. *Id.* at 116.

Mr. Terwilleger has a long history of mental illness. CP sealed report at 4-5. At the scene, he “seemed kind of off,” enough to make police “question his mental state at the time.” 7/25/17 RP at 40. The next day, he told police that the “Crips gang” and the “Mexican Mafia” attempted to kidnap his girlfriend, and he needed to disable Mr. Holloway’s vehicle in order to thwart the kidnapping. *Id.* at 114-15. He believed Mr. Holloway was a member of the Crips because he wore blue. Ex. 30.

In its response brief, the state argues that Mr. Terwilleger’s convictions should be upheld. This argument fails for three reasons. First, Mr. Terwilleger did not forgo a mental health defense. Second, his trial attorney failed to sufficiently investigate his mental status at the time of the incident. Third, Mr. Terwilleger’s statements and demeanor evidenced his inability to voluntarily speak with police.

A. Mr. Terwilleger did not Forgo a Mental Health Defense.

The state argues that Mr. Terwilleger chose not to pursue a mental health defense, excusing his attorney from raising this issue. Br. of Respondent at 5-6. According to the state, Mr. Terwilleger “refused to cooperate” with his attorney’s efforts to investigate his mental health and chose not to present this defense. *Id.* at 3-4, 8.

The evidence does not support the state’s contentions. Contrary to the state’s brief, Mr. Terwilleger did cooperate with his attorney. At both the October 17 and November 21, 2016, hearings, Mr. Terwilleger expressed frustration with his attorney’s continuance requests specifically because he already provided his attorney with information about his mental health, including providers. 10/17/16 RP at 10; 11/21/16 RP at 14.

The evidence also does not support the state’s argument that Mr. Terwilleger did not want to present a mental health defense. Br. of Respondent at 8. The state is correct that Mr. Terwilleger was found competent and could choose whether to raise this argument. *See id.* at 7-8. However, Mr. Terwilleger did not forgo this defense because he repeatedly raised his mental health prior to trial.

Throughout the case, Mr. Terwilleger wrote numerous letters to the court. In these documents, he argued that he was mentally ill at the time of the incident and requested expert testimony to support this contention. In

January 2017, Mr. Terwilleger argued that he suffered from dementia and delirium. CP at 308-12. In February 2017, he filed a “motion to allow a [sic] expert or a third party [sic] witness” to testify at trial. CP 120. Mr. Terwilleger sought to have a mental health professional testify about his PTSD, traumatic brain injury, and other issues. CP 132. Far from refusing to cooperate with his attorney, Mr. Terwilleger repeatedly attempted to raise his mental health as an issue in this case. His attorney had an obligation to follow his client’s wishes and investigate.

Additionally, even if Mr. Terwilleger unequivocally refused to raise a mental health defense, his attorney still had a duty to investigate in order to properly advise his client. *State v. Fedoruk*, 184 Wn. App. 866, 882, 339 P.3d 233 (2014); *see also State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010). As explained below, Mr. Terwilleger’s trial attorney fell short of this obligation.

B. Mr. Terwilleger’s Trial Counsel Failed to Sufficiently Investigate a Mental Health Defense.

The state argues that Mr. Terwilleger’s trial counsel sufficiently investigated a mental health defense because he requested continuances on October 17, 2016, and November 21, 2016. Br. of Respondent at 3-5. At the latter hearing, counsel also requested a competency evaluation for Mr. Terwilleger. 10/17/16 RP at 13, 15.

The state's argument is not persuasive for two reasons. First, a competency evaluation is not sufficient to investigate a potential mental health defense. In *Fedoruk*, the accused underwent a competency evaluation, which found him competent, but the Court of Appeals still reversed because his attorney did not do more to investigate his mental health at the time of the alleged crime. 184 Wn. App. at 875, 881-82.

Second, requesting continuances was not sufficient; reasonable defense counsel would have retained experts to evaluate Mr. Terwilleger's mental health at the time of the incident. The record suggests that counsel did not retain such an expert. As previously argued, defense counsel did not request authorization for funding and did not call an expert witness at the CrR 3.5 hearing. Additionally, in the months following the continuances, Mr. Terwilleger continued to raise his mental health in letters to the court, including listing a possible expert witness. CP at 120, 132, 308-12. It is unclear whether counsel followed up on Mr. Terwilleger's requests, but he did not raise mental health at trial or call this witness to testify.

Mr. Terwilleger's trial counsel knew that he had a lengthy history of mental illness, including prescriptions for antipsychotics, a head injury, and five contacts with regional support services in 2016 alone. CP sealed report at 4, 5. He knew that Mr. Terwilleger behaved strangely at the scene and

made bizarre statements in jail the next day. 7/25/17 RP at 40, 114; Ex. 30. Under these circumstances, counsel should have done more to investigate a potential mental health defense.

C. Mr. Terwilleger's Statements and Demeanor Evidenced his Inability to Speak Voluntarily with Police.

The state also claims there was “no evidence that that the Defendant’s mental state at the time he gave a statement to the officers impaired his ability to understand his rights.” Br. of Respondent at 13-14. The state points out that at the CrR 3.5 hearing, two police officers testified about Mr. Terwilleger’s statements, and Mr. Terwilleger testified that he could not remember. *Id.* at 13. According to the state, this means that the officer’s testimony was “unchallenged” and Mr. Terwilleger’s statements were voluntary. *Id.*

This argument fails because it ignores Mr. Terwilleger’s demeanor and the content of the statements themselves. Mr. Terwilleger’s statements were not involuntary because he could not remember them months later at the CrR 3.5 hearing. His statements were involuntary because, *at the time they were made*, his demeanor “seemed off,” enough to raise questions about his mental health. 7/25/17 RP at 40. His statements were involuntary because when he spoke to police, Mr. Terwilleger expressed delusions, including that he feared for his girlfriend’s life; thought the “Crips gang”

and the “Mexican Mafia” were trying to abduct her; believed her uncle, Mr. Holloway, was a Crip because he wore blue; and believed the officer at the scene was on the Mexican Mafia’s payroll. *Id.* at 114-15; Ex. 30.

These are not statements of a sane and stable person voluntarily confessing to police officers. These statements and Mr. Terwilleger’s demeanor constitute evidence of his mental state at the time. This evidence establishes that his statements were involuntary and should have been excluded.

II. CONCLUSION

Brian Terwilleger received ineffective assistance of counsel. His involuntary statements to police were also improperly admitted. Mr. Terwilleger respectfully requests that this Court reverse his convictions and remanded for a new trial.

RESPECTFULLY SUBMITTED this 2nd day of July, 2019.



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CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On July 2, 2019, I electronically filed a true and correct copy of the **Reply Brief of Appellant, Brian Terwilleger**, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document as indicated below:

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