

NO. 52823-1-II

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

STATE OF WASHINGTON,

Appellant,

v.

HAYDEN VONBARGEN,

Respondent.

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

The Honorable James W. Lawler, Judge

BRIEF OF RESPONDENT

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A. SUMMARY OF THE RESPONSE TO THE STATE'S ARGUMENTS

Hayden VonBargen is mentally retarded and facing serious felony charges for texting, at age 19, with a younger teen.

Hayden is very suggestible. Hayden does not learn new information with ease or depth. Hayden does not communicate easily.

The state and the defense agree retarded Hayden is not competent to assist his attorney at trial. Hayden's limited mental abilities prevent him from meeting the constitutional requirement that Hayden assist his attorney in the state's prosecution of Hayden. Hayden's mere presence in court with his attorney does not equate to competency.

The court listened purposefully to both the state and defense expert testimony on the topic of Hayden's likely "restoration" to a legally competent, prosecutable, defendant. The court's reasoned opinion? Hayden's competency is not restorable. Statutory authority, coupled with judicial discretion, allowed the court to make that decision. Abiding by that law of what's next, the court dismissed Hayden's charges without prejudice.

The prosecutor asked the court to reconsider its decision but, in so doing, added no new information or argument to the equation. The court declined the invitation to reconsider its well-reasoned decision.

The state, by its appeal, now invites this court, without the benefit of seeing and interacting with Hayden, to second guess the trial court's use of discretion to find retarded Hayden's competency not restorable and thus not sending Hayden to engage in the useless gesture of competency restoration.

This court should decline the state's invitation.

B. COUNTERSTATEMENT OF THE ISSUES

1. Trial judges are tasked with the duty to make a decision after hearing motion testimony presented by both the state and the defense. Trial judges do not abuse their discretion by making a reasoned decision adverse to one party. In Hayden's case, the court heard from a defense expert and a state's expert as to Hayden's competency to stand trial and the likelihood of Hayden's competency restoration. In deciding the restoration issue, the court adopted the defense expert's opinion that restoration would not work rather than the state's expert's contrary opinion. Did the trial court abuse its discretion, as a decision-maker, by making a choice as to which expert's opinion to adopt?
2. If a trial judge finds a defendant incompetent and determines competency cannot be restored, the judge acts within statutory authority under RCW 10.77.086(4), and its own discretion, to not order restoration. Did the trial court abuse its discretion when, after finding retarded Hayden not competent and not restorable, it followed the discretion granted by statute to order Hayden not be sent for restoration?

3. An aggrieved party is entitled to file a motion for reconsideration, but a trial court is not obligated to grant the motion. The trial court declined to reconsider its decision to not order restoration and dismissed, without prejudice, the charges against retarded, incompetent, and non-restorable Hayden. Did the trial court abuse its discretion in declining to reconsider its decision when the decision was well-reasoned and founded on the authority granted to the court by RCW 10.77.086(4)?
4. RCW 10.77.086(4) allows courts to dismiss criminal charges against a defendant, like retarded Hayden, when the court finds the defendant incompetent and unlikely to regain competency. The trial court found Hayden not competent and unlikely to regain competency. Did the court abuse its discretion by applying RCW 10.77.086(4) and dismissing the charges against Hayden without prejudice?

C. STATEMENT OF THE CASE

Hayden VonBargen is a retarded 19-year-old boy. RP¹ 33. Other terms for “retarded” are intellectual disability and developmentally disabled. CP 29; RP 33. Regardless of which term is applied, Hayden is retarded. CP 29. There is no cure for retardation. RP 10.

Hayden’s retardation was apparent between ages two and three. CP 28. It was “catastrophic” news for his parents. CP 21.

¹ Hayden’s brief follows the same reference to the verbatim report of proceedings as noted in the state’s brief at footnote 1, page 3. To reiterate: There are two verbatim report of proceedings. The brief will refer to the proceedings held on 11/30/17 as RP (11/30/17). The other verbatim report of proceedings containing three hearings; 7/25/18, 8/21/18, and 9/19/18, which is continually paginated will be cited as RP.

Hayden lives with his parents. CP 28. He has always lived with his parents. CP 28.

Hayden's parents work hard to give their retarded son opportunity and a full life. CP 28. Nevertheless, per Hayden's father, Karl VonBargen, Hayden "is quite dependent upon his parents in order to manage his life." CP 28.

Hayden was "initially identified for special education services at age three while attending the Centralia School District." CP 29.

Revaluations completed in October 2007, October 2009, and October 2012, found Hayden "eligible as a student with mental retardation." CP 29. Hayden's needs for special education "has been well documented since early childhood." CP 29.

At age 11, Hayden's school tested his intelligence. These were the results as compared to compatible aged youth:

Verbal comprehension – 1% (lower than 99% of others in his age group)

Perceptual reasoning - 5% (lower than 95% of others in his age group)

Working memory – 1% (lower than 99% of others in his age group)

Processing speed – 7% (lower than 93% of others in his age group)

CP 29.

Hayden's full-scale IQ, as tested, was just 64, putting him in the lowest one percentile for his age group. CP 29. IQ remains relatively static throughout a person's life. RP 35.

In school, Hayden required "modifications, accommodations, and supplemental services" to include the following: small group instruction, frequent use of repetition, use of positive reinforcement, use of concrete material, extended time on assignments and tests, alternative environments available for testing, use of assistive technology, simplified test wording, breaking down tasks into smaller increments, allowing extra time to process and produce information, shortened directions, allowing for breaks as needed, increased use of visual, tactile, and verbal cues, and providing a reader and a scribe. CP 19.

Hayden graduated from high school but at all times attended as a special education student with cognitive and learning deficits. CP 17, 29.

Hayden's teachers know Hayden as kind and a person with a "strong desire to please others." CP 29-30.

Hayden lags behind his peers in adaptive skills. CP 19.

Post high school, Hayden attends "very entry-level" classes in English, math, and physical education at Centralia Community College. He

takes the classes only as a way to help him learn to interact with others and maintain some social skills learned through high school. CP 18, 29. Hayden knows his English class is a “special” class. CP 18. Per Hayden’s parents, taking classes gives Hayden a “sense of purpose.” CP 21.

Even around family, Hayden tends to be quiet and reserved. CP 28. He has difficulty understanding the meaning of words and phrases. CP 18. He has difficulty articulating himself verbally and has trouble following directions. He forgets verbal instructions. CP 18.

Hayden requires help to feed himself. His parents provide needed support. He cannot shop for groceries independently. CP 21. Hayden is

confused and unable to seek out items based on their conceptual category such as frozen items belonging in the freezer section. He can prepare some packaged food items with which he has familiarity such as frozen waffles, macaroni and cheese, and frozen chicken nuggets. He won’t “deviate from his favorites” and is unable to follow instructions to prepare novel packaged foods and sometimes those with which he does have a repeated learning history of preparation. For example, he will ask for guidance such as “do I take the cardboard off?” while preparing frozen pizza.

CP 21.

Hayden, as a retarded person, has little insight into life as others experience it. For example, when being evaluated for competency by defense expert Dr. Oneal, Hayden told the doctor he had never worked because “I guess I’ve never had time to do it.” CP 29.

At home, Hayden can feed the cat, but only if reminded. CP 18. He can mow the lawn, but only if supervised. In an effort at normalization, Hayden's parents allow him to drive the family car a limited distance. CP 18. Hayden can sweep. CP 18. He has difficulty counting change. CP 18. His parents have to give him verbal reminders to attend to his personal hygiene and self-care. CP 18.

Karl VonBargen knows Hayden always demonstrates much younger social skills and tends to relate more to younger children because of his delays. CP 29.

Hayden's parents encouraged Hayden to socialize with younger teens in their church's youth group. CP 30. It seemed like a good fit because Hayden more easily relates to people younger than himself. CP 29-30.

Hayden demonstrated his developmental connection to a younger person in the allegations leading to the charges brought by the state. CP 5-7.

Hayden and a 13 or 14-year-old girl from his church youth group befriended each other. CP 5. While Hayden is a young boy mentally, his body is still that of a 19-year-old male. Hayden texted the girl. CP 5-7. During their text exchange, Hayden introduced the sex topic and asked

the girl if she was interested in sex with him and would meet him someplace and have sex. CP 6. Hayden texted her a picture of a penis after the girl indicated she was okay with Hayden sending her “dirty picks.” CP 6-7. Someone contacted the police. CP 5. The police, in turn, contacted Hayden. CP 5.

The state moved in and charged Hayden with four counts of felony communication with a minor for immoral purposes because he sent electronic communications to a person under 18 years old ostensibly for immoral purposes.² CP 13-15.

Hayden’s parents, having encouraged their son to engage with younger people because of a more comparable mentality, now feel quite guilty about their retarded son being in this fix. CP 29-30.

While making court appearances on his case, Hayden’s lack of competency to assist his counsel and fully appreciate and engage in a criminal prosecution was readily apparent to the state and defense counsel as illustrated by their joint request Hayden be assessed for

² Hayden is facing a standard range sentence of 51-60 months in prison. See Appendix. Ironically, had Hayden and the girl engaged in sex talk in person, or Hayden had shown the girl his penis in person, Hayden’s actions would only satisfy the legal elements of the gross misdemeanor version of communication with a minor for immoral purposes. RCW 9.68A.090(1).

competency. CP 8-12. The court necessarily required Hayden to participate in a competency evaluation. CP 8-9.

Western State Hospital licensed psychologist Dr. Susannah David evaluated Hayden. CP 16-26; RP 4.

Hayden's counsel and parents retained an expert, Dr. Brent Oneal, for a private evaluation. RP 21-23; CP 16-26 (David); CP 27-34 (Oneal). Dr. Oneal has a Ph.D. in clinical psychology. He is a licensed mental health counselor and psychologist. His practice focuses on doing forensic evaluations for legal matters including competency to stand trial. He also works through Harborview Medical Center conducting evaluations of psychiatric patients and testifies about their needs for further hospitalization. RP 23.

Both Dr. Oneal and Dr. David completed evaluations and filed written reports with the court. CP 16-26 (David); CP 27-34 (Oneal).

Judge Lawler heard the competency hearing on July 25, 2018. RP 1-48. Both Doctors David and Oneal appeared and testified consistently with their reports. RP 4-45. Both doctors submitted Hayden was not competent to assist his attorney in his defense. RP 10, 26; CP 16 (David), CP 33 (Oneal).

Dr. Oneal also found Hayden was incompetent in that he had no ability to understand the nature of the proceedings against him. RP 26; CP 32.

Dr. Oneal believed Hayden's competence could not be restored. RP 30. Dr. Oneal noted in his written report to the court:

[S]hould the court wish to consider competency restoration in this matter, it is my opinion that Mr. VonBargen is not an appropriate candidate for that service. Typical court-appointed competency restoration involves teaching about the court process and administration of psychiatric medication (when warranted). Mr. VonBargen's competency-related problems are the result of a developmental disability that is quite unlikely to be improved via basic teaching or psychiatric medication. It is also worth noting that Mr. VonBargen was not able to learn much of the information that he was taught during the competency evaluation.

CP 34.

Dr. Oneal has firsthand knowledge of competency restoration effectiveness as he had taught competency restoration. RP 32.

No medication would make Hayden less retarded. RP 13.

Dr. David opined Hayden's intellectual disability – retardation - would not change, but she believed he could learn legal concepts if compelled to live at Western State Hospital and engage in four hours of daily instruction, five days a week, for somewhere between 45-90 days. RP 11-13.

The court found Hayden not competent. RP 47; CP 37-38. The court also found Hayden's could not be "restored" to competency.³ RP 47; CP 38.

The state filed a motion asking the court to reconsider its ruling. CP 35-36. The court declined to reconsider its ruling. RP 53-56; CP 45.

The state appeals the court's August 21, 2018 findings that (1) Hayden's competency is not restorable and (2) the court's denial of its motion for reconsideration. CP 50-54.

The trial court dismissed Hayden's charges without prejudice. CP 55.

D. ARGUMENT

Issue 1: The trial court did not err in declining to order Hayden to engage in efforts at competency restoration and did not violate the provisions of RCW 10.77.086 in so doing.

The trial court acted within its discretion, and with authority of law, when it declined to send mentally retarded Hayden VonBargen for competency restoration, finding it a useless act because Hayden is retarded and has no competency to restore. RP 55-56.

³ "Restored" is something of a misnomer in this case. Based on the record, it is doubtful Hayden has ever been competent because Hayden has always been retarded.

a. Hayden is not competent.

The experts agree: Hayden is not competent to assist his attorney in his defense. RP 10, 26; CP 16, 33. Dr. Oneal also found Hayden did not have the capacity to understand the nature of the proceedings against him. CP 32; RP 26.

Criminal defendants have a constitutional right not to be tried while incompetent. It is unquestionably a fundamental right. *Cooper v. Oklahoma*, 517 U.S. 348, 354, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996); *Drope v. Missouri*, 420 U.S. 162, 171-72, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) (accused person's competency to stand trial is “fundamental to an adversary system of justice”). The right not to be tried while incompetent is protected by the due process clause of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Medina v. California*, 505 U.S. 437, 439, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992).

Washington law implements this due process protection by statute. RCW 10.77.050 provides, “[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” *State v. Coley*, 180 Wn.2d 543, 551, 326 P.3d 702 (2014).

The two-part test for competency in Washington is (1) whether the defendant understands the nature of the charges; and (2) whether he is capable of assisting in his defense. *In re Fleming*, 142 Wn.2d 853, 862, 16 P.3d 610 (2001); *State v. Hahn*, 106 Wn.2d 885, 894, 726 P.2d 25 (1986); *State v. Ortiz*, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985).

This court reviews trial court competency determinations for abuse of discretion. *Ortiz*, 104 Wn.2d at 482 (noting trial court's "wide discretion" in competency determinations). A court abuses its discretion only when an "order is manifestly unreasonable or based on untenable grounds." *In re Pers. Restraint of Rhome*, 172 Wn.2d 654, 668, 260 P.3d 874 (2011) (internal quotation marks omitted) (quoting *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009)). A discretionary decision is "manifestly unreasonable" or "based on untenable grounds" if it results from applying the wrong legal standard or is unsupported by the record. *Id.*

Reviewing courts in Washington defer to the trial court's judgment of a defendant's mental competency. *Ortiz*, 104 Wn.2d at 482. A trial court's competency determination will only be reversed upon finding an abuse of discretion. *State v. Sisouvanh*, 175 Wn.2d 607, 620,

290 P.3d 942 (2012). Here, the trial court did not abuse its discretion.

Rather, the court used its discretion to make a fair and informed decision.

A person is competent to stand trial only when he has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and to assist in his defense with “a rational as well as factual understanding of the proceedings against him.” *Dusky v. United States*, 362 U.S. 402, 403, 480 S.Ct. 788, 4 L.Ed.2d 824 (1960) (internal quotations omitted); *Fleming*, 142 Wn.2d at 861; *State v. Fedoruk*, 426 P.3d 757, 766 (Wash. Ct. App. 2018), *review denied*, 192 Wn.2d 1012 (2019).

In Hayden’s case, both experts agreed Hayden had no competence to assist his counsel in his defense. CP 16, 33; RP 10, 26. The court agreed with the experts. “Based on expert testimony the Court finds the defendant is not currently competent to stand trial.” Court’s Findings of Fact and Conclusions of Law 1.5. CP 38.

Notably, the abuse of discretion standard is an appropriate standard on competency issues because (1) the trial court is in a better position than the appellate court to make a given determination, (2) a determination is fact-intensive and involves numerous factors to be weighed on a case-by-case basis, (3) the trial court has more experience

making a given type of determination and a greater understanding of the issues involved, (4) the determination is one for which no rule of general applicability could be effectively constructed, and (5) there is a strong interest in finality and avoiding appeals. *Sisouvanh*, 175 Wn.2d at 621.

Washington courts have compiled a list of “competency factors” that the finder of fact is encouraged to consider. In *Dodd*, this court noted the “trial judge may make his determination from many things, including the defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel.” *State v. Dodd*, 70 Wn.2d 513, 514, 424 P.2d 302 (1967). The guiding principle is to allow the trial court wide discretion to consider the evidence that best illuminates whether the defendant has the mental capacity to make the “sum total of decisions that a defendant may be called upon to make during the course of a trial.” *Godinez v. Moran*, 509 U.S. 389, 398, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993); *State v. Ortiz-Abrego*, 187 Wn.2d 394, 404, 387 P.3d 638 (2017).

This counsel, reflecting on her own trial practice, believes the “sum total of decisions” as articulated in *Ortiz-Abrego* above include:

To understand and appreciate his current legal situation; to understand and appreciate the charges against him; to understand and

appreciate the relevant facts of the case; to understand and appreciate the legal issues and procedures in the case; to understand and appreciate the legal defenses available on his behalf; to understand and appreciate the dispositions, plea, and penalties possible; to identify and locate witnesses; to relate to defense counsel; to trust and communicate relevant information with his attorney; to comprehend instructions and advice; to make decisions after receiving advice; to maintain a collaborative relationship with his attorney and help plan legal strategy; to follow testimony for contradictions and errors; to testify relevantly and cross-examine if necessary; to challenge prosecution witnesses; to tolerate stress, including trial and waiting for trial; to disclose pertinent facts surrounding the alleged offense.

The preceding list requires a lot of decisions for anyone unfamiliar with the criminal justice system, never mind a retarded boy schooled through the special education system.

It is problematic in this case that Hayden is so suggestible and works to please. RP 27-29; CP 31. A pleaser is not likely to tell an attorney they do not understand something. The suggestibility piece says Hayden will agree to something that is not true simply for the sake of

agreeability. Match that suggestibility with the skills and abilities needed to assist counsel, and you, as an attorney are at ground zero.

The record of the competency hearing reflects the trial court patiently listened to the evidence, reviewed the reports, and made a reasoned decision on competency and in no way abused its discretion in doing so. The trial court weighed and balanced the testimony and written reports of the two expert doctors, one from the state and the other from the defense. RP 47-48; CP 16-34. The court agreed with both experts that Hayden's inability to assist his attorney made him incompetent. CP 38; RP 47. The state, in its argument, does not challenge the court's finding. Brief of Appellant at 5-15.

b. The court acted within its statutory authority when it did not send Hayden for competency restoration.

Because Hayden lacked competency, the trial court moved on to the next step in its analysis: deciding whether Hayden's competency could be restored such that Hayden could be tried on the offenses. RCW 10.77.086 guides the court on felony competency restoration. The court determined Hayden could not be restored. The court acted within its discretion in making that decision.

- (i) The judge listened to the expert testimony, reviewed the expert reports, weighed the evidence, applied the evidence to the facts, and acted within his statutory authority to find Hayden’s competency could not be restored.**

The court heard the testimony of the state and defense experts.

The court found it a futile gesture to require Hayden to undergo competency restoration. CP 38. The court’s decision is an appropriate use of the judge’s discretion. RCW 10.77.086(4). A trial court does not abuse its discretion because it chooses the testimony of one expert over the testimony of another expert.

A trial court abuses its discretion only if the “exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Black*, 191 Wn.2d 257, 266, 422 P.3d 881 (2018) (quoting *In re Det. of Post*, 170 Wn.2d 302, 309, 241 P.3d 1234 (2010)). A trial court's decision “is presumed to be correct and should be sustained absent an affirmative showing of error.” *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). Far from an abuse of discretion, the court’s decision in this case is the epitome of a well-reasoned decision. Courts make decisions all the time. That is what courts do.

Under RCW 10.77.086(4), the court is not required to compel meaningless restoration efforts, as follows:

For persons charged with a felony . . . if the court or jury at any stage finds that the defendant is incompetent and the court determines that the defendant is unlikely to regain competency, the charges shall be dismissed without prejudice [.]

The court found Dr. Oneal's testimony and opinion well-reasoned and persuasive and, accordingly, relied on it.

Dr. Oneal tested Hayden's IQ at 73, putting him at the 4th percentile for his age. CP 30. Hayden's IQ suggests "his cognitive abilities are at extremely low." CP 30. Hayden tested with poor attention, concentration, and short-term memory commensurate with his intellectual test results. CP 31. Hayden's DSM-V Diagnosis is Intellectually Disabled. RP 31.

Furthermore, Dr. Oneal tested for Hayden's competence in light of the task at hand: Could Hayden assist his counsel in defending against the serious charges and, more broadly, be a true participant in the prosecution and defense of the state's case? CP 33-34.

Dr. Oneal found retarded Hayden did not currently possess a fundamental capacity to understand the nature of the proceedings against him. CP 32. Retarded Hayden demonstrated a limited understanding of the charges against him, a limited understanding of the penalties he could face, a poor understanding and appreciation for the

possible plea agreement process, and a limited understanding and appreciation of the trial process. CP 32. On a small positive note, Hayden did have some basic understanding of the roles of the prosecutor, the defense attorney, the community corrections officer, and the judge. CP 33.

Dr. Oneal, wanting to assess and understand how Hayden would fare in the court process, used the Gudjonsson Suggestibility Scale (GSS) to test Hayden's susceptibility to questions and his psychological vulnerability to being given negative feedback specifically because those dynamics are often present during the testimony process. CP 31. Dr. Oneal's concern was that in a trial process Hayden would be vulnerable to changing his response – whether correct or not – when put under even mild pressure. RP 31. What testing revealed is Hayden's ability to retain or recall information is very poor, and he is quite suggestible. RP 29.

While Hayden is willing to assist his counsel, Hayden's reasoning abilities are too impaired to do so adequately. CP 33. Hayden did not possess the communication abilities to consult with his attorney or testify. CP 33. Hayden's abilities at verbal expression are a particular challenge for Hayden. CP 33. Hayden's attentional deficits are significant enough to impede his ability to adequately attend to the proceedings. CP

33. In short, although Hayden would be physically present at his trial, he did not have the mental acumen to be mentally present as the law requires. CP 33-34.

Dr. Oneal provided compelling testimony that Hayden was not an appropriate candidate for competency restoration to include administration of psychiatric medication. CP 34. Hayden was simply not competent because of his historical developmental disability. CP 32-33. Hayden's disability makes it quite unlikely he can improve via basic teaching or psychiatric medication. CP 34. Dr. Oneal noted Hayden was not able to learn any particular amount of the information he was taught during the competency evaluation. CP 34. For Hayden, "restore" is likely too strong of a word because it implies something lost that can be regained.

Hayden was accommodated in school by small group instruction, use of frequent repetition, and use of concrete examples. CP 19. Hayden needed extended times on tests, simplified test wording, rephrasing test questions and directions, and increased use of visual, tactile and verbal cues. CP 19. None of the adjustments made at school translate to the pressure Hayden would be under at trial: a sterile courtroom full of strangers with an authoritative person wearing a black robe who was

orchestrating and controlling what happens in the courtroom, as well as witnesses and jurors moving in and out of the courtroom and staring at Hayden.

(ii) The court is not obliged to send Hayden for wasted efforts at competency restoration and, by abiding by RCW 10.77.086(4), did not order Hayden sent for restoration.

The state's challenge to Judge Lawler's authority and decision-making abilities to find lack of competence and decline the forced competency restoration was squarely within the court's authority, under RCW 10.77.086(4), as aforementioned. This court should deny the state's challenge.

The burden of proof at a competency hearing is an issue of statutory interpretation reviewed de novo. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010); *Coley*, 180 Wn. 2d at 551. In deciding Hayden's case, the trial court acted squarely within its statutory discretion in deciding Hayden would not be sent for competency restoration.

It is certainly within the state's power to disagree. But it is exclusively within the court's power to decide important questions such as whether a retarded boy could be "restored" and made competent to be tried and locked away. The trial court heard all the evidence, observed

Hayden in the courtroom and made the right decision. Hayden is neither competent nor restorable. There is no error in the court's dismissal of the serious felony charges, without prejudice, against Hayden.

Issue 2: The trial court acted within its discretion when it denied the state's motion for reconsideration and dismissed Hayden's charges without prejudice.

The trial court was well within its discretion in denying the state's motion for reconsideration. The court's authority to not order restoration is authorized by statute.

RCW 10.77.086(1)(c) authorized the court to do what it did, as follows:

If the court determines or the parties agree that the defendant is unlikely to regain competency, the court may dismiss the charges without prejudice without ordering the defendant to undergo restoration treatment[.]

Furthermore,

(4) For persons charged with a felony . . . if the court . . . at any stage finds that the defendant is incompetent and the court determines that the defendant is unlikely to regain competency, the charges shall be dismissed without prejudice, and the court shall order the defendant be committed to a state hospital as defined in RCW 72.23.010 for up to seventy-two hours starting from admission to the facility, excluding Saturdays, Sundays, and holidays, for evaluation for the purpose of filing a civil commitment petition under chapter 71.05 RCW.

The statute specifically authorized the court to do what it did. The court acted within its discretion when it found – by agreement – that Hayden is not competent and, in turn, found Hayden’s competency is not restorable (if he was ever competent to begin with).

Under the state’s analysis, the court’s hands are tied once a person is found incompetent. The state argues that once found incompetent, a person must be subjected to competency restoration. Brief of Appellant at 5. But that is not true. First, the statute says to the contrary. RCW 10.77.086. Second, if true, there would never need to be a hearing on competency restoration because the court’s hands are tied by the mere finding of incompetency.

Based on this record, it does not seem the state even agrees with that assertion. The state participated in a full competency hearing including both experts’ opinion on restoration. RP 1-51. During the competency hearing, the state never told the court that once incompetency was found, it did not need to hear anything about restoration. The state invited its expert to weigh in on restoration. RP 10-15.

If the court were to follow the statute to the letter, the court should have sent Hayden for a 72-hour civil commitment. RCW

10.77.086(4). But the court should not be faulted in this instance as the state never asked the court to do that. RP 47- 50. Plus, Hayden is not a problem. The state's resources are limited. Hayden has a good home and a good supportive family. He is mentally retarded. Hayden is not the person a civil commitment targets.

The state, in presenting its argument for reconsideration, gave the court no new information to consider. The court did not err in abiding by its prior well-informed, and well-reasoned decision. The court did not err in denying the motion.

The granting or denial of a motion for reconsideration is within the sound discretion of the trial court. *Lilly v. Lynch*, 88 Wn. App. 306, 321, 945 P.2d 727 (1997). As such, it will be overturned only upon an abuse of discretion. *Id.*; *State v. Englund*, 186 Wn. App. 444, 459, 345 P.3d 859 (2015). But the court did not abuse its discretion. The court listened to the evidence, found the facts, and applied the law as it is entitled to do.

E. CONCLUSION

Hayden VonBargen is mentally retarded and not competent.

The trial court correctly concluded that any effort at Hayden's restoration would be useless, given his retardation and developmental disability. The court acted within its discretion when not ordering Hayden to undergo restoration. The court properly declined to consider the state's motion for reconsideration because there was nothing new to reconsider.

The court acted within its authority when it dismissed Hayden's charges without prejudice.

Respectfully submitted September 5, 2019.



LISA E. TABBUT/WSBA 21344
Attorney for Hayden Vonbargen

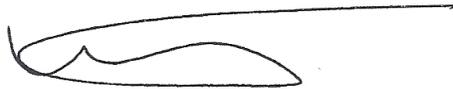
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares:

On today's date, I filed the Brief of Respondent to (1) Lewis County Prosecutor's Office, at appeals@lewiscountywa.gov and sara.beigh@lewiscountywa.gov; (2) the Court of Appeals, Division II; and (3) I emailed a copy to Hayden's father pursuant to his request.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed September 5, 2019, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', written over a horizontal line.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Hayden Vonbargen, Respondent

APPENDIX

Communication with a Minor for Immoral Purposes Subsequent Violation or Prior Sex Offense Conviction

RCW 9.68A.090(2) CLASS C – NONVIOLENT/SEX/CRIMES AGAINST PERSONS OFFENDER SCORING RCW 9.94A.525(17)

If the present conviction is for a felony domestic violence offense where domestic violence was plead and proven, use the General Nonviolent/Sex Offense Where Domestic Violence Has Been Plead and Proven scoring form on page 255.

ADULT HISTORY:

Enter number of sex offense felony convictions x 3 = _____
 Enter number of felony convictions x 1 = _____

JUVENILE HISTORY:

Enter number of sex offense felony dispositions x 3 = _____
 Enter number of serious violent and violent felony dispositions x 1 = _____
 Enter number of nonviolent felony dispositions x ½ = _____

OTHER CURRENT OFFENSES:

(Other current offenses that do not encompass the same conduct count in offender score)

Enter number of other sex offense felony convictions x 3 = _____
 Enter number of other felony convictions x 1 = _____

STATUS:

Was the offender on community custody on the date the current offense was committed? (if yes) _____ + 1 = _____

Total the last column to get the **Offender Score** (Round down to the nearest whole number)..... _____

SENTENCE RANGE

Offender Score										
	0	1	2	3	4	5	6	7	8	9+
LEVEL III	2m	5m	8m	11m	14m	19.5m	25.5m	38m	50m	55.5m
	1 - 3	3 - 8	4 - 12	9 - 12	12+ - 16	17 - 22	22 - 29	33 - 43	43 - 57	51 - 60*

- ✓ For gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 245 for standard range adjustment.
- ✓ For deadly weapon enhancement, see page 253.
- ✓ For sentencing alternatives, see page 235.
- ✓ For community custody eligibility, see page 247.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 242.
- ✓ If the offender is not a persistent offender and has a prior conviction for an offense listed in RCW 9.94A.030(38)(b), then the sentence is subject to the requirements of RCW 9.94A.507.

LAW OFFICE OF LISA E TABBUT

September 05, 2019 - 12:28 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52823-1
Appellate Court Case Title: State of Washington, Appellant v. Hayden Vonbargen, Respondent
Superior Court Case Number: 17-1-00635-6

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