

**FILED**  
**Court of Appeals**  
**Division II**  
**State of Washington**  
**11/8/2019 3:13 PM**

NO. 53048-1-II

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

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STATE OF WASHINGTON,

Appellant,

v.

AKEEM ISRAEL SLYE,

Respondent.

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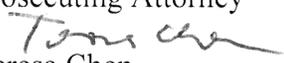
Appeal from the Superior Court of Pierce County  
The Honorable Judge Frank E. Cuthbertson

No. 18-1-00029-9

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**REPLY BRIEF OF RESPONDENT**

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## I. INTRODUCTION

In July of 2018, the trial court dismissed the child rape and child molestation charges without prejudice. It was “entirely possible” that the Defendant could become competent with repetitious explanation of concepts. However, it was not likely to occur within the two weeks remaining in the competency restoration period.

After dismissal, the Defendant remained at Western State Hospital and continued to work with treatment providers. Four months later, the prosecutor refiled the charges, believing in good faith that the Defendant had or would become competent. That decision was based on information developed after the July dismissal. The proecutor’s reasons include all of those found to be sufficient in *State v. Carneh*, 149 Wn. App. 402, 203 P.3d 1073 (2009) and more.

The trial court erroneously dismissed the charges finding the State lacked a good faith basis to refile, but also did not act in bad faith. No new competency hearing or determination was made based on the Defendant’s progress over the last several months.

The Defendant confuses the timeline and misstates the record. He continually misrepresents the State’s arguments, setting up straw man arguments instead and implicitly conceding the State’s points by failing to address them.

## **II. RESTATEMENT OF THE ISSUES**

1. Did the court err in finding the State lacked a good faith basis to refile?
2. Is a further restoration period available when the case is refiled after a dismissal without prejudice?

## **III. STATEMENT OF THE CASE IN REPLY**

The Respondent/Defendant Slye indicates that in November or December of 2018, the trial court ordered DSHS to designate an expert subject to the State's approval. Brief of Respondent (BOR) at 5-6, citing CP 25, 30. The Defendant's citation refers to an evaluation and restoration order filed almost a year earlier in January 19, 2018. The correct citation is CP 181.

The DSHS secretary did not comply with the court order. 4RP 11, ll. 3-9. And the court took no action on the improper evaluation filed by Dr. Sharette. CP 338. Instead, the court put aside the contested competency issue in order to entertain the defense motion to dismiss. *Id.* The Opening Brief of Appellant (BOA) at 9-10 summarizes the correct sequence of events.

The Defendant suggests that the trial court found he was unlikely to become competent based on a December 2018 evaluation performed by an expert in violation of RCW 10.77.060(1)(a) for a competency hearing that never took place. BOR at 6-7. This is not the record. The court's finding

specifically explains that it is referencing language in a July 2018 order (CP 152-53) referencing a July 2018 forensic evaluation (CP 132-51). CP 437, 449 (FF 21). That evaluation opined that the Defendant was “not likely to improve *in the limited amount of time offered by the law.*” CP 149 (emphasis added). As the State has previously explained, the time remaining by law was only 15 days. BOA at 7 (citing CP 27; RCW 10.77.086(1)(a)(ii)).

The Defendant states that Dr. Hendrickson and Dr. Sharette made “lengthy” evaluations of him. BOR at 19. This description is not supported in the record. Dr. Hendrickson interviewed the Defendant only once; his report does not detail how long they spoke. CP 16, 20. Dr. Sharette also only met with the Defendant once before writing his July 2018 evaluation. CP 135-36, 142. The interview lasted less than two hours. CP 136. The Defendant passed that time avoiding questions and eye contact, repeating answers when his speech was too soft, not responding, pausing at length, talking about video games, and excusing himself to use the restroom. CP 142-44.

#### **IV. ARGUMENT IN REPLY**

The Argument in Reply addresses the arguments in the order that they have been reorganized in the Respondent’s Brief.

**A. The court’s dismissal is not based on a new competency evaluation performed in December, but on a finding that the State lacked a good faith basis to refile in November.**

The Defendant argues that the court found that he “is” unlikely to become competent, suggesting that a new competency determination had been made in January of 2019. BOR at 8, 10. This is incorrect. The court’s finding was that in July of 2018, a different judge determined him to be incompetent. CP 437, 449 (FF 21). There was no new competency hearing or determination made after that time.

The Defendant asserts that the case was dismissed in January 2019 “due to” his incompetency. BOR at 8. This is false. In *July of 2018*, it was dismissed due to his incompetency. CP 152-53. In January of 2019, as the court explained in its conclusions of law, it dismissed due to a finding that the State “did not have [ ] a good faith basis at the time of refiling.” CP 438, 450 (CL 1).

The Defendant’s inaccurate portrayal of the record is not helpful to this Court.

**B. The Defendant does not respond meaningfully to the State’s discussion of RCW 10.77.084, thereby conceding the argument.**

One of the two issues raised in the Brief of Appellant is the interpretation of RCW 10.77.084. BOA at 20-26. As the State previously explained, a finite number of restoration days is permitted *before the court must enter a dismissal “without prejudice.”* That number is generally 90 +

90 + 180 days or, if incompetency is solely the result of a developmental disability, just 90 days. The Legislature has determined that a single restoration attempt may not exceed 12 months (or 3 months for DD). On this, the parties are agreed. *See* BOR at 12-13.

However, if charges are refiled, the court may attempt restoration anew. This is why dismissal is without prejudice. RCW 10.77.084(1)(c) and (d). And this is exactly what happened in *State v. Carneh*, 149 Wn. App. 402, 40-5-08, 203 P.3d 1073 (2009). After dismissal, the restoration process began anew.

The State explained why this is reasonable. BOA at 22. Competency is fluid. It can be lost and regained. Persons with developmental disabilities can learn legal information and retain it while useful, forget it, and relearn it – similar to competency with a foreign language or musical instrument.

To interpret the statute any other way is to render superfluous the language of dismissal *without prejudice*, which would violate standards of statutory construction. *State v. Mohamed*, 187 Wn. App. 630, 637, 350 P.3d 671 (2015) (“A court should not adopt an interpretation that renders any portion of the statute meaningless or superfluous.”).

To this, the Defendant has no response. In failing to address this, he concedes the legal issue. *In re Pullman*, 167 Wn.2d 205, 212 n. 4, 218 P.3d 913, 915 (2009); *In re Cross*, 99 Wn.2d 373, 379, 662 P.2d 828, 832 (1983)

Instead, the Defendant argues that the State was required to contest the July 2018 dismissal. BOR at 14-15. This is not relevant to any issue raised on appeal.

The Defendant seems to think it is relevant, because the State specifically noted that it had not agreed with the dismissal. BOR at 14 (citing BOA at 8). The State noted this, because the State challenged Findings of Fact 3 and 4. BOA at 3, 12, 19. These findings, drafted by defense counsel, are misleading. CP 431, 443. The language improperly suggests that the State agreed to dismissal when in fact the State only approved as to form. And the language improperly suggests that an objection is relevant on the issue of good faith refiling. It is not. Insofar as the findings suggest this, the State has assigned error to them.

The Defendant claims that the State has not addressed the findings which it has challenged. BOR at 3. In fact, every challenged finding is addressed in the State's Statement of the Case which provides the actual record. The Defendant only fails to observe this.

**C. The Defendant’s attempt to distinguish *Carneh* does him no favors.**

The Defendant notes that Carneh was restored to competency briefly before decompensating repeatedly. BOR at 18. *See also Carneh*, 149 Wn. App. at 405-06. He claims that, unlike Carneh, he is unlikely to ever become competent. BOR at 18 (citing CP 25, 224). However, the record cited does not say this. As the State has repeatedly pointed out, Dr. Sharette only opined that the Defendant was unlikely to become competent in the two weeks remaining of the restoration period. CP 224. As far back as 2015, evaluators stated that it is “entirely possible that [Slye] could at some point in the future be able to sufficiently learn to become competent.” 3RP 6. In 2018, an expert opined that restoration was possible simply through “repetitious explanation of concepts.” CP 125.

The Defendant is plainly capable of learning. Shortly after this case was filed, he demonstrated his grasp of a complicated legal concept – the prohibition against comments on silence. He told Dr. Hendrickson that the prosecutor could not force him to take the stand and assert his right to remain silent, because “The jury would think you did it.” CP 22. Law enforcement professionals struggle to apply this concept as evidenced by the large number of cases on the topic. *See e.g. State v. Burke*, 160 Wn.2d 204, 181 P.3d 1 (2008) (reversing convictions where prosecutor elicited testimony and argued the defendant’s interview had been curtailed by his

father); *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996) (reversing convictions where officer testified defendant did not answer his questions).<sup>1</sup>

The Defendant, however, grasped it.

No expert has opined that the Defendant will never achieve legal competency.

The Defendant notes that *Carneh's* incompetency was not due to a developmental disability. BOR at 17-18. This is a fact. However, the trial court relied upon *Carneh* in dismissing the State's case. Therefore, it is not helpful to his position to distinguish the one legal authority which requires a good faith basis to refile.

**D. The State had a good faith basis to refile charges.**

The chief issue on appeal is whether the trial court erred in finding the State had no good faith basis to refile. BOA at 13-20. The Defendant purports to reach this issue in section 4 of the Respondent's Brief. BOR at i. However, this section is filled with straw man arguments and digressions.

The Defendant claims that the State has argued that a competency evaluation must occur before the trial court decides whether there was a good faith basis to refile. BOR at 19. He provides no citation. Nor can he,

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<sup>1</sup> Zachariah Bryan, [Mistrial called for man accused of forcing woman to overdose](https://www.heraldnet.com/news/mistrial-called-for-man-accused-of-forcing-woman-to-overdose/), HeraldNet, May 9, 2019. <https://www.heraldnet.com/news/mistrial-called-for-man-accused-of-forcing-woman-to-overdose/> (mistrial called after officer testified defendant had declined to answer questions).

because the State has not made this argument. The Honorable Judge Cuthbertson decided to hear the motion to dismiss first. The State did not object. It did not reach the competency question, dismissing before a contested competency hearing could be held. The question is not whether the trial court would find the Defendant currently competent – a matter entirely hypothetical and unknowable prior to motions and testimony. The question is whether the State acted in good faith based on the information known to the prosecutor when charges were refiled in November 2018.

The Defendant suggests the State is challenging prior competency determinations. BOR at 19-20. It is not. Competency is fluid. Prior determinations are not relevant to the State's belief regarding the Defendant's current status based on progress gained and information learned in the ensuing months.

The Defendant digresses to a discussion of how a competency evaluation should be made after the case is refiled. BOR at 20-21. Because the trial court dismissed prior to holding the contested competency hearing, this is premature and not relevant to the issues on appeal.

He suggests that the State refiled charges in order to relitigate the Defendant's competency in July of 2018. BOR at 21. Another straw man – which he eventually acknowledges. BOR at 26.

The Defendant accuses the State of misrepresenting the record while he himself misrepresents both the record and the law. BOR at 21-22. He claims that Dr. Sharette's report was proper because the State "did not register any disapproval of Dr. Sharette ... beforehand, and even afterward." BOR at 22. The law requires that any evaluator "shall be approved by the prosecuting attorney." RCW 10.77.060(1)(a). There is a difference between "shall approve" and "failing to register disapproval."

In this case, DSHS failed to advise the prosecutor who would be assigned to perform the evaluation. 1RP 35-36. The prosecutor only learned of the assignment after the evaluation was filed on December 4, 2018. Even so, the prosecutor plainly and timely registered disapproval of Dr. Sharette on November 26, 2018, three days before the interview was conducted and a week before the State was advised of the Department's assignment. CP 244; 1RP 40. The prosecutor advised the court that he did not approve of any of the doctors at Western State "in regards to developmentally delayed individuals." 1RP 40. Dr. Sharette is a doctor at the Western State Hospital campus. CP 255-56, 259.

The Defendant argues that the trial court rejected the State's reasons as being "factually inaccurate." BOR at 22. He provides no citation to the record, and none exists, to show either that the trial judge made this finding

or that he relied on reports that were created after the prosecutor decided to refile.

The prosecutor was advised that the Defendant was completing hundreds of pages of math homework and was 1.5 credits shy of graduating high school. CP 341-42, 392; 2RP 12. This is not disputed. CP 257 (confirming this information). Rather the Defendant argues that after the prosecutor refiled, Dr. Sharette generated a report explaining that the quality of the Defendant's academic work, while qualifying him for high school graduation, would not support a GED. CP 257. This does not conflict with the information known to the prosecutor or speak to her good faith basis. The prosecutor cannot lack good faith for relying only upon information known to her at the time of her decision.

The Defendant argues that it was "not surprising" that he was being transitioned into the community after only a few months and well before the civil commitment expired. BOR at 23. In fact, it was surprising to the prosecutor and frustrating to the AAGs. CP 389-90 ("Just want to make sure I understand this correctly: Western State is looking at releasing him earlier than March 2019?" before the civil commitment expires); CP 423, ¶¶ 9-11 (consulting with the AAGs to verify that WSH intended to return the Defendant to the community despite their own assessment of his risk). And it was surprising to Judge Cuthbertson who considers the Defendant to

be a serious danger<sup>2</sup> to others and who is under the misapprehension that the most recent dismissal can prolong the Defendant's civil commitment. CP 423, ¶¶ 10, 17; CP 438 ¶3; 2RP 21, 27-29, 41, 47.

The Defendant argues that release to the community does not suggest a change in his situation. BOR at 24. This is not plausible. The Community Notifications Officer explained that a change in residence and “progression of freedoms” was an earned status demonstrating a “step in a patient's progress during treatment,” “level of responsibility and readiness for release.” CP 386. The Defendant would have to be “assess[ed] for clinical readiness and public safety.” *Id.* Release would occur if he “reaches the point in treatment where he is deemed clinically ready for unescorted off grounds privileges” or “clinically appropriate for authorized leave” – meaning an ability to understand and follow multiple legal conditions. CP 386-87, 422. This absolutely demonstrated progress and a

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<sup>2</sup> Dr. Hendrickson had opined that the Defendant was not dangerous, suggesting that he was unaware of the Defendant's full history. CP 24. In the proposed order appointing Dr. Muscatel, the prosecutor wanted to make sure that the expert was familiar with all the allegations. CP 394-401. The Defendant was alleged to have committed indecent liberties by rubbing his testicles against the upper leg of a sleeping woman. CP 395. He was alleged to have committed residential burglary by shattering the glass in a door in an attempt to gain access to a minor-aged female who was home alone. *Id.* Shortly after those cases were dismissed for the Defendant's incompetency, he was alleged to have committed burglary and attempted, forcible rape by breaking into an office wearing a Halloween mask and hoodie, picking up the leasing agent, throwing her on the ground, pinning her, pulling her hair, trying to slam her head against the floor, and pressing his erection against her as she screamed and tried to fight him off. *Id.* Each time when caught, he fled, indicating consciousness of wrongdoing. *Id.*

basis to reinstate charges. In fact, the officer invited the prosecutor consider it. CP 387.

The Defendant would like to emphasize his deficits for the Court. BOR at 25. But no record supports the conclusion he draws – that he is incapable of learning.

In his first evaluation, the Defendant demonstrated a high level of competency. CP 20-23; BOA at 7. However, he knew that charges would be dropped if it was perceived that he did not understand the proceedings. CP 353. Interestingly, the more legal education the Defendant received, the more he presented as uncommunicative and the deficits appeared to grow. His treatment provider explained, he is “wily like a fox.”

Restoration for intellectual disability is not as simple as prescribing medication. It is time-intensive education. DSHS has admitted it is overwhelmed with referrals and would like to see more prosecutions dismissed. CP 70-110. In subsequent evaluations, the psychologists relied more on the Defendant’s history and spent less time interviewing him. The description of the last interview appears to be a very slight edit of a copy and paste. *Cf.* CP 143, 245.

In any case, neither defense counsel’s perception nor any court’s perception of the Defendant’s actual deficits are relevant to the prosecutor’s good faith. The trial judge placed himself in the prosecutor’s shoes and

decided he would not have refiled. CP 449, ¶19. But this is not the test. Persons can disagree; disagreement does not equate to bad faith. And in this case, the prosecutor's reasons for refiling are demonstrably stronger than those advanced in *Carneh*. *Carneh*, 149 Wn. App. at 410-11 (finding the prosecutor acted in good faith where there was reason to believe that the defendant's competency will be restored again and where the defendant was about to be moved to a ward with more privileges of movement).

The trial prosecutor has reason to believe the Defendant is already competent or capable of shortly becoming so. She believes this based on the Community Notification Officer's letter, the Treatment Provider's reports and communications, and communications with the Attorney General's Office. These documents and communications determine that the Defendant was advancing in his education and in his social communication. After several months, he had progressed in his treatment and was graduating to steps requiring that he be more responsible and comply with legal conditions. The court found no bad faith. This record demonstrates good faith. This would be consistent with the analysis in *Carneh*.

**E. The Defendant mischaracterizes and ultimately fails to address the State's argument that Conclusion of Law 2 was not the appropriate subject of the motion before the court.**

Judge Cuthbertson heard and decided the Defendant's motion to dismiss for lack of a good faith basis to refile. He did not address the State's

request for a contested competency hearing. Therefore, Conclusion of Law 2, a *sua sponte* ruling that no further restoration periods will be permitted in this case, is improper where the issue was not before the court.

The Defendant does not address this argument, implicitly conceding the State is correct.

The State pointed out that a different but “substantially similar question” had been before Judge Arend. BOA at 24. Because the question was actually raised to her, unlike Judge Cuthbertson, she had the benefit of some argument and arrived at a different conclusion. She found that, after a dismissal and refiling, the competency question begins anew procedurally. 1RP 23. So finding, she entered an order for a new evaluation. CP 180-86.

The Defendant misses the point entirely by complaining that the precise, identical question, i.e. restoration, was not before Judge Arend. Where the briefs are at cross purposes, whether intentionally or otherwise, this dilutes the appellant’s actual argument and is unhelpful to the Court. The State does not adopt the arguments which the Defendant has attributed to it.

**F. The Defendant's conflation of an earlier competency determination with a later good faith basis for refiling is neither meaningful nor persuasive.**

The Defendant concludes that the trial court properly found no good faith basis to refile charges in November 2018, because he has been evaluated to be incompetent in the past. BOR at 32-33. This is not logical.

Past incompetency is not the legal standard. “[C]ompetence is not a prerequisite for charging an individual” and “known incompetency does not bar refiling.” *Carneh*, 149 Wn. App. at 409-10.

Past incompetency was not the State's basis for refiling. The State has never argued that it refiled, because it believes that the Defendant was actually competent at the time of those prior evaluations. The State believes he has either become competent or will become competent.

No record supports a conclusion that the Defendant cannot learn or could not have increased his comprehension since July 2018. After the case was dismissed in July 2018, DSHS civilly committed the Defendant and continued to work with him. Three months later, his treatment provider, who is not a competency evaluator, opined that he had learned as much he was going to about the legal processes and was wily like a fox. CP 392, 423. There was no competency hearing to assess the progress he had made after the dismissal in July.

And past incompetency was not the reason for trial court's dismissal. Its ruling was not predicated on a misapprehension of the State's argument. CP 449, ¶19. The court found no good faith, because it misapprehended the record and legal standard. BOA at 19. This actual basis for dismissal was error and is unjustifiable under the legal authority.

**V. CONCLUSION**

The State respectfully requests this Court reverse the dismissal in its entirety, holding that there was a good faith basis to refile, that a restoration period is permitted upon the refile of charges, and that any appointment of an expert must be with the approval of the prosecutor as required by RCW 10.77.060(1)(a).

RESPECTFULLY SUBMITTED this 8th day of November, 2019.

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Teresa Chen WSB# 31762  
Deputy Prosecuting Attorney

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~E-file~~ or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

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**PIERCE COUNTY PROSECUTING ATTORNEY**

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