

FILED
Court of Appeals
Division II
State of Washington
10/11/2019 4:19 PM

No. 53048-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

AKEEM I. SLYE,

Respondent,

v.

STATE OF WASHINGTON,

Appellant.

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

BRIEF OF RESPONDENT

NANCY P. COLLINS
Attorney for Respondent

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .. 2

C. STATEMENT OF THE CASE..... 3

D. ARGUMENT..... 8

The court appropriately dismissed the charges without prejudice due to overwhelming evidence that Mr. Slye is substantially cognitively disabled and unlikely to become competent to stand trial in a reasonable time 8

1. A person who is accused of a crime but incompetent to stand trial may not be detained in jail indefinitely 8

2. The trial court has limited statutory authority to order the detention of an incompetent person for purposes of restoration 11

3. Once charges are dismissed due to the accused person’s enduring incompetence, the prosecution must demonstrate a good faith belief of a change in a suspect’s restorability to re-file the charges 15

4. The prosecution did not establish a good faith basis to believe Mr. Slye was reasonably likely to become competent to stand trial in the near future 18

5. The prosecution misrepresents the decision entered by Judge Arend to claim Judge Culbertson improperly overruled the prior judge 28

6. The court’s ruling is supported by the law and factual record and should be affirmed 32

E. CONCLUSION	33
---------------------	----

TABLE OF AUTHORITIES

Washington Supreme Court

State v. Carneh, 149 Wn. App. 402, 203 P.3d 1073 (2009) . 15, 16,
17, 18, 21, 27

State v. Hand, 192 Wn.2d 289, 429 P.3d 502 (2018) ... 8, 9, 13, 33

State v. McCarthy, _Wn.2d _, 446 P.3d 167 (2019) 9

State v. Ortiz-Abrego, 187 Wn.2d 394, 387 P.3d 638 (2017). 9, 12,
26

State v. Pettitt, 93 Wn.2d 288, 609 P.2d 1364 (1980)..... 16

Washington Court of Appeals

State v. Kidder, 197 Wn. App. 292, 389 P.3d 664 (2016)..... 26

United States Supreme Court

Drope v. Missouri, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103
(1975)..... 8

Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d
824 (1960)..... 8, 27

Jackson v. Indiana, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d
435 (1972)..... 9, 10, 31

United States Constitution

Eighth Amendment 8

Fourteenth Amendment..... 8

Washington Constitution

Article I, § 3	8
Article I, § 14	8

Statutes

RCW 10.77.010	8
RCW 10.77.050	8
RCW 10.77.060	30, 31
RCW 10.77.083	12
RCW 10.77.086	11, 12, 13, 14, 27, 31

Other Authorities

Patricia Zapf, <i>Standardizing Protocols For Treatment To Restore Competency Stand Trial: Interventions And Clinically Appropriate Time Periods</i> , Wash. State Inst. Pub. Pol’y (2013)	11, 18
<i>State v. Ray</i> , 429 Md. 566, 57 A.3d 444 (2012)	16

A. INTRODUCTION

Akeem Slye's developmental disability impairs his cognitive functions as well as his language and communication abilities. He has difficulty remembering, understanding, and discussing legal concepts. He has had multiple competency evaluations. Each time, evaluators found him incompetent.

In November 2018, the prosecution refiled charges that had been dismissed four months earlier due to Mr. Slye's enduring incompetence to stand trial. After reviewing Mr. Slye's current mental state and assessing the information the prosecution provided, the court found there was no good faith basis to believe Mr. Slye was competent or that restoration efforts would render him competent for trial. The court dismissed the charges without prejudice to refile.

The trial court's ruling is soundly supported by the record and should be affirmed. The prosecution's arguments on appeal inaccurately portray the circumstances before the trial court and misconstrue the law.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. After a court dismisses charges filed against an accused person who is incompetent due to a developmental disability, the prosecution may refile the charges only if it shows a good faith basis to believe the accused person will be competent. Mr. Slye has a developmental disability that renders him incompetent to stand trial. No expert believes he is likely to attain competence in the near future. Did the court act within its discretion, pursuant to the governing statute and the due process rights accorded to a person accused of a crime, when it ruled the State lacks a good faith basis to refile charges due to the absence of evidence Mr. Slye is likely to become competent to stand trial?

2. On appeal, this Court defers to a trial court's competency determination, and only examines the court's factual rulings to decide if they are manifestly unreasonable. The prosecution nominally assigns error to almost every factual finding the court made. It offers no argument about Findings of Fact 14, 15, 17, 18, 19, and 20, despite assigning error, and does not explain how the record conflicts with Findings of Fact 2, 3, 4,

6, 12, 13, 21, and 22. Where the court's factual findings are soundly supported by the record, and the prosecution does not offer evidence contradicting these findings, are the findings essentially unchallenged verities that are deferred to on appeal?

C. STATEMENT OF THE CASE.

On January 2, 2018, the prosecution charged 19 year-old Akeem Slye with committing several offenses that occurred between 2008 and 2015. CP 3-4, 261. The court immediately ordered a competency evaluation. CP 7.

The evaluator found Mr. Slye incompetent to stand trial. CP 24. He explained that Mr. Slye's "continuing cognitive limitations," due to his mild intellectual disability and language and communication disorders, "significantly impair his ability to have a rational understanding of the court proceedings he faces." CP 19, 24. No party contested Mr. Slye's lack of competency and the court entered an order that Mr. Slye was incompetent to stand trial. CP 26.

The court ordered Mr. Slye detained for 90 days for competency restoration. CP 26. Mr. Slye waited in jail for four months before the State admitted him to Western State Hospital

to start this restoration. CP 443. Following restoration efforts, Dr. Jonathan Sharrette evaluated Mr. Slye in July 2018. CP 134. Mr. Slye remained incompetent to stand trial. CP 135, 152-53.

Dr. Sharrette did not recommend further psychiatric treatment and noted there “is no available psychiatric treatment . . . that would improve his cognitive or verbal skill.” CP 444 (Finding of Fact 4). He concluded, “[a]dditional time and effort are not likely to increase his understanding of competency-related information. His language and intellectual deficits are long-standing and well-documented.” CP 444 (Finding of Fact 4).

Neither the prosecution nor defense contested Dr. Sharrette’s conclusions. CP 152-53; CP 445. On July 9, 2018, the court entered an order dismissing the case, finding Mr. Slye incompetent and not likely to be restored. CP 152-53. It referred him to Western State Hospital for potential civil commitment. CP 153.

Four months later, on November 9, 2018, the prosecution refiled the same charges the court dismissed in July. CP 174-75. It claimed Western State Hospital was considering releasing Mr.

Slye from his civil commitment, pending review by the End of Sentence Review Board. CP 179.

Mr. Slye was transferred from Western State Hospital to the Pierce County jail to face these refiled charges. CP 446. The prosecution asked the court to order a new competency evaluation. 11/16/18RP 3, 12. It also asked the court to appoint Kenneth Muscatel to perform this evaluation rather than a Western State Hospital psychologist, because the State felt the Western State Hospital psychologists did not do a thorough enough evaluation. 11/16/18RP 3, 13-14. Mr. Slye's attorney objected and demanded discovery to explain the prosecution's factual basis for refiled charges against Mr. Slye. 11/16/18RP 10-11, 16-18, 20-22; CP 187, 1923-9

The court refused to appoint Dr. Muscatel to conduct the competency evaluation because the prosecution had not offered evidence of Dr. Muscatel's qualifications to conduct an evaluation of a developmentally disabled person, and the statute requires an expert with these qualifications. 11/16/18RP 25-26. The court ordered the secretary of the Department of Social and

Health Services (DSHS) to designate a qualified expert subject to the State's approval. CP 25, 30.

Dr. Sharrette conducted another evaluation of Mr. Slye's competency in December 2018. CP 238. He concluded Mr. Slye remained incompetent due to his on-going intellectual disability, language impairment, and communication disorders. CP 238-39, 244-45, 247, 250-51. These developmental disabilities left Mr. Slye unable to rationally understand the legal system or communicate with his attorneys. CP 250-51.

Dr. Sharrette also evaluated the prosecution's claim that Mr. Slye had been advancing in math coursework and was close to obtaining a high school diploma, which it believed showed he was no longer incompetent to stand trial. CP 257. Dr. Sharrette spoke to Mr. Slye's teacher. *Id.* She explained Mr. Slye was doing the third to fifth grade level worksheets, focusing on fourth grade. *Id.* It was "not uncommon" for him to get half of the information wrong on these worksheets. *Id.* Due to his individualized education program (IEP), he would receive credits towards his high school diploma based solely on his effort, time

spent, and attendance, without regard to whether he understood the subject matter. *Id.*

After presenting the court with information indicating Mr. Slye's disabilities had not abated, and he had not gained any skills enabling him to rationally understand the charges or communicate with his lawyers, the judge found insufficient evidence of a basis to refile the charges against him. CP 449-50.

Instead, the court concluded that the evidence showed Mr. Slye was unlikely to become competent to stand trial. CP 449. The court ordered the refiled charges dismissed without prejudice. CP 250.

The court also ordered Mr. Slye be referred for civil commitment evaluation. CP 250; 1/11/19RP 43. It suggested to the prosecution that if it did not believe Mr. Slye was safe to be in the community, it could urge his continued civil commitment under RCW 71.05. 1/11/19RP 47.

The prosecution filed a notice of appeal from the court's order "Dismissing Felony Charges and Directing Civil Commitment Evaluation." CP 442.

D. ARGUMENT.

The court appropriately dismissed the charges without prejudice due to overwhelming evidence that Mr. Slye is substantially cognitively disabled and unlikely to become competent to stand trial in a reasonable time.

1. A person who is accused of a crime but incompetent to stand trial may not be detained in jail indefinitely.

It violates both due process and the governing statute to initiate a trial for a person who is incompetent. *Drope v. Missouri*, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); *State v. Hand*, 192 Wn.2d 289, 294, 429 P.3d 502 (2018); RCW 10.77.050 (“[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues”); U.S. Const. amends. VIII; XIV; Const. art. I §§ 3, 14.¹

Competency to stand trial requires both a capacity to understand the nature of the charges and to assist in one’s own defense. RCW 10.77.010(15); *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960). The person must have

¹ The Fourteenth Amendment and article I, section 3 similarly provide, “No person shall be deprived of life, liberty, or property without due process of law.” The Eighth Amendment and article I, section 14 prohibit “excessive bail.”

“sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding ... and a rational as well as factual understanding of the proceedings against him.” *State v. Ortiz-Abrego*, 187 Wn.2d 394, 403, 387 P.3d 638 (2017), quoting *Dusky*, 362 U.S. at 402.

A trial court has wide discretion in determining whether a person is competent to stand trial. *Ortiz-Abrego*, 187 Wn.2d at 402. “Applying an abuse of discretion standard, a reviewing court will find error only when the trial court’s decision is manifestly unreasonable or is based on untenable grounds.” *State v. McCarthy*, _Wn.2d _, 446 P.3d 167, 172 (2019).

An accused person who is not competent to stand trial retains a liberty interest in freedom from incarceration. See *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972); *Hand*, 192 Wn.2d at 296. The “mere filing of criminal charges surely cannot suffice” to confine a person who is not competent to stand trial when it is unlikely he become competent in a reasonable time. *Jackson*, 406 U.S. at 724-25.

In *Hand*, the defendant was denied his right to substantive due process because the State held him in jail for 76

days waiting to complete a pretrial competency evaluation. 192 Wn.2d at 294. This “prolonged incarceration while awaiting treatment may cause serious harm to defendants and does not meaningfully advance the State’s interest in restoring defendants’ competency to stand trial.” *Id.* at 298.

The state’s detention of a person in hopes that the person will become competent to stand trial “cannot” last “more than the reasonable period of time necessary to determine where there is a substantial probability that he will attain that capacity in the foreseeable future.” *Jackson*, 406 U.S. at 738. In *Jackson*, the defendant was indefinitely confined after he was found incompetent to stand trial. 406 U.S. at 718. He was deaf, unable to speak, and had cognitive limitations. *Id.* State law allowed his civil commitment until he became competent even though doctors did not believe he could develop the skills necessary to understand the charges and participate in his defense. *Id.* The Supreme Court ruled this indefinite detention was unconstitutional. *Id.* at 738.

Here, the court found “Mr. Slye is not likely to regain competency.” CP 449 (Finding of Fact 22). His barrier to

competency “is cognitive in nature and past psycho-educational restoration efforts have been unsuccessful.” *Id.* Accordingly, it violates his substantive due process rights, as well as the statutory scheme, to hold him in custody involuntarily when it is not likely he will become competent in the foreseeable future.

2. *The trial court has limited statutory authority to order the detention of an incompetent person for purposes of restoration.*

When a person is incompetent to stand trial, the court is permitted, but not required, to authorize a “restoration” attempt under RCW 10.77.086. “Restoration” consists of treatment for mental health issues and education about the legal system to help a person gain the rational understanding required to be competent to stand trial. *See Patricia Zapf, Standardizing Protocols For Treatment To Restore Competency Stand Trial: Interventions And Clinically Appropriate Time Periods*, Wash. State Inst. Pub. Pol’y 15 (2013) (explaining treatment protocols for competency restoration).²

² Available at: http://www.wsipp.wa.gov/ReportFile/1121/Wsipp_Standardizing-Protocols-for-Treatment-to-Restore-Competency-to-Stand-Trial-Interventions-and-Clinically-Appropriate-Time-Periods_Full-Report.pdf (last viewed Oct. 7, 2019).

Our state’s procedural safeguards guarding against a person being prosecuted who is not competent are more protective than federal law. *Ortiz-Abrego*, 187 Wn.2d at 404. RCW 10.77.086 sets forth the court’s authority once a person has been found incompetent to stand trial for a felony charge.

First, the court shall order an “initial period of commitment for competency restoration.” RCW 10.77.086(1)(a) and (b). This restoration period must be “for a period of no longer than ninety days.” RCW 10.77.086(1)(a)(i).

However, the court is not required to order a person be confined for any restoration period. If the court determines the accused person “is unlikely to regain competency, the court may dismiss the charges without prejudice *without* ordering the defendant to undergo restoration treatment.” RCW 10.77.086(1)(c) (emphasis added).

If the court orders an initial 90-day restoration attempt, this is the only restoration period permitted for a person whose incompetence is due to a developmental disability. RCW 10.77.086(3).³ In other situations, when incompetence stems

³ RCW 10.77.083(3) provides in pertinent part:

from a mental illness, the court has discretion to authorize a second or third effort at restoration, so long as the court finds there is a reasonable basis to believe restoration efforts will lead to the person's competence to stand trial. RCW 10.77.086(3). The court is not permitted to order confinement for purposes of restoration when the court does not find restoration is likely to lead to the person regaining competence. RCW 10.77.086(1)(c), (3), (4).

When a person remains incompetent at the end of the statutorily permitted period for attempting restoration, "the charges shall be dismissed without prejudice." RCW 10.77.086(4); *Hand*, 192 Wn.2d at 294 ("If competency is not restored, the court shall dismiss the criminal proceedings without prejudice"). If the court dismisses the charges without prejudice, it must order the defendant be referred for a civil commitment under RCW 71.05. RCW 10.77.086(1)(c) ("the court shall order that the defendant be referred for evaluation for civil

No extension shall be ordered for a second or third restoration period as provided in subsection (4) of this section if the defendant's incompetence has been determined by the secretary to be solely the result of a developmental disability

commitment in the manner provided in subsection (4) of this section.”).

Mr. Slye went through the restoration process as outlined in RCW 10.77.086. The prosecution filed felony charges against him in January 2018. CP 3-4. The court immediately ordered a competency evaluation. CP 7. The court expressly requested an assessment based on developmental disability. CP 9.

The Western State Hospital evaluator found him to be incompetent due to a developmental disability. CP 24. The court ordered a 90-day period of restoration. CP 26-27. At the end of this period, Mr. Slye remained incompetent pursuant to a second evaluation by a different psychologist. CP 152-53.

As mandated by statute, the court dismissed the charges without prejudice and referred Mr. Slye for civil commitment under RCW 71.05. CP 152-53. The court entered this order on July 9, 2018. *Id.*

On appeal, the prosecution asserts it did not agree to the court’s findings Mr. Slye was incompetent and not restorable in January and July 2018. Opening Brief at 8, 19. But at the time,

which is such that competence is not reasonably likely to be

the prosecution did not contest these issues. It did not file any pleadings or ask the trial court to take any other action. It did not seek review in this Court. In fact, the trial prosecutor agreed “we did not contest” Mr. Slye’s prior evaluations or the related orders. 1/11/19RP 26. The court’s findings recounting the procedural history of the case, including the lack of objections by the State, are supported by substantial evidence.

Mr. Slye was civilly committed under RCW 71.05 until the prosecution refiled the same charges on November 9, 2018.

3. Once charges are dismissed due to the accused person’s enduring incompetence, the prosecution must demonstrate a good faith belief of a change in a suspect’s restorability to re-file the charges.

After a person has been found incompetent, restoration efforts have expired, and charges dismissed without prejudice, the prosecution may re-file its charges and re-initiate the prosecution only if it has a good faith belief that the procedures authorized by RCW 10.77 will likely lead to restoration of competency to stand trial. *State v. Carneh*, 149 Wn. App. 402, 203 P.3d 1073 (2009).

regained during an extension.

The prosecution does not have “unfettered discretion” to file charges at any time. *Id.* at 409. They must “act in good faith.” *Id.*, citing *State v. Pettitt*, 93 Wn.2d 288, 295, 609 P.2d 1364 (1980). This good faith obligation “necessarily assumes” the prosecution files charges only after considering a wide range of factors other than the strength of the evidence or its desire to prosecute. *Pettitt*, 93 Wn.2d at 295.

In the context of a person who has been found incompetent, not restorable, and the time for restoration has expired, a renewed prosecution requires new information and tangible reasons to believe competency could be attained in the foreseeable future. 149 Wn. App. at 411; *see also State v. Ray*, 429 Md. 566, 570, 57 A.3d 444, 447 (2012) (after “statutorily-prescribed time periods expire and charges are dismissed” because person not restorable, prosecution must overcome “presumption” that accused person is unrestorable).

In *Carneh*, the defendant had a serious mental illness that rendered him incompetent to stand trial. 149 Wn. App. at 406. His mental illness subsided with proper medications. *Id.* at 405. During his initial prosecution, he regained competency

several times, only to decompensate during his trial. *Id.* at 405-06.

In *Carneh*, all parties agreed it was reasonably probable the defendant could become competent over time, with treatment. 149 Wn. App. at 407, 412. The court dismissed the charges without prejudice but expected the defendant's condition would improve. *Id.* at 406. The prosecution refiled charges later, when it learned from Western State Hospital that Mr. Carneh's behavior had substantially improved and it was going to allow him to travel on his own in the community. *Id.* at 406-07. This information signaled to the prosecution that Mr. Carneh's expected restoration had occurred and it re-filed charges. The Court of Appeals found the prosecution had good-faith basis to re-file the charges under RCW 10.77 under these circumstances. *Id.* at 411-12.

Mr. Slye's case is far afield from the situation in *Carneh*, as the trial court recognized. 1/11/19RP 15-16, 23-24, 29-30. Unlike *Carneh*, Mr. Slye does not have a mental illness capable of subsiding with medication. 1/11/19RP 23-24. In fact, no psychotropic medication is prescribed for him. CP 224.

He suffers from a developmental disability that has impaired his cognitive abilities throughout his life. In *Carneh*, the court and parties jointly expected the defendant would be restored to competency, and he was in fact restored to competency during the proceedings several times. But Mr. Slye has not attained competence at any time and it remains “doubtful” that Mr. Slye will gain the rational understanding necessary to be competent to stand trial. CP 25; *see* CP 224.

4. The prosecution did not establish a good faith basis to believe Mr. Slye was reasonably likely to become competent to stand trial in the near future.

As the trial court explained, there is “overwhelming evidence” that Mr. Slye’s intellectual disability as well as language and communication disorders result in his inability to understand the legal process or rationally assist in his defense. 1/11/19 RP 45. All evaluators say his condition is unlikely to improve. 1/11/19RP 42.

Studies show there is a “low probability of restoration” for a person whose basis for incompetence is a long-standing cognitive disorder. Zapf, Wash. State Inst. Pub. Pol’y at 20. “For defendants with developmental disabilities, educational

treatment programs may be one of the only means for increasing the level of competence; however, there is limited scientific evidence for the overall efficacy of implementing these resource-intensive training programs.” *Id.* at 16.

Mr. Slye was twice found incompetent to stand trial in January and July, and a third time in December 2018, due to his developmental disabilities, following lengthy evaluations performed by two different psychologists. CP 26, 152-53; 250-51. He had also been found incompetent and not restorable in 2014 and 2015, when he faced other charges. CP 213-14 (summarizing findings); CP 444 (Finding of Fact 5).

On appeal, the prosecution insists that before it shows a basis to refile charges, it should be allowed to have the court appoint a new expert of its own choosing, and that its discontent with prior evaluations is enough of a reason for the court to allow the State to obtain a separate competency evaluation. The prosecution does not point to any statutory authority or case law to support this position.

To the extent the prosecution is now challenging the court’s prior competency orders, entered in January and July

2018, this claim should be disregarded as waived, unpreserved, and irrelevant. 1/11/19RP 20-21. As the trial court noted, the prior findings and orders of incompetency and lack of restorability were “issued by [Judges] Rumbaugh, . . . Costello, [and] by Serko” after State had opportunity to oppose those findings. *Id.* The prosecution entered no timely objections to those competency orders.

The prosecution’s desire for the court to appoint an evaluator of its choosing is also not the subject of this appeal and is not properly before this Court on appeal. CP 441 (notice of appeal). When the State refiled its charges, it asked the court to appoint Dr. Muscatel to evaluate Mr. Slye’s competency instead of a DSHS-designated evaluator. 11/16/18R 3. The court refused after the State failed to show Dr. Muscatel had the statutorily mandated expertise in development disability. 11/16/18RP 24-25, 26; 11/16RP43-44; CP 182.

The prosecution complains that it “lost confidence” in WSH experts and by refileing the charges, it is entitled to have another person of its choosing evaluate Mr. Slye. 1/11/19RP 26. But as the trial court ruled, the good faith basis to refile must

exist in order for the State to pursue a new competency evaluation and demand further restoration. 1/11/19RP 23-24, 41-42; *Carneh*, 149 Wn. App. at 411. The prosecution is not entitled to refile charges based on speculation that if a different person of its choosing did the evaluation, it is possible Mr. Slye could be competent. *See Carneh*, 149 Wn. App. at 411 (at time prosecutors refile charges against incompetent individuals, they “must have a good faith basis to believe that the procedures outlined in chapter 10.77 RCW will likely lead to the restoration of the defendant’s competency to stand trial.”).

While the prosecution complains about Dr. Sharrette on appeal, the trial prosecutor said she had “little personal experience with Dr. Sharrette.” 1/11/19RP 33. The focus of its complaints was Dr. Hendrickson, who performed the January 2018 evaluation. 11/16/18RP13-14, 17. When the court pressed the prosecutor to explain what specific information in Dr. Sharrette’s report was incorrect or unsupported, the prosecutor could not answer. 1/11/19RP 36.

On appeal, the prosecution also asserts the court was not permitted to rely on the December 2018 evaluation because the

prosecution objected to the appointment of a Western State Hospital expert. Opening Brief at 19-20. But this misrepresents what happened in the trial court. The court denied the State's request to appoint Dr. Muscatel, because the State had not offered evidence of his qualifications. 11/16/18RP 26, 28. The court directed the secretary of DSHS to appoint an evaluator, subject to the approval of the prosecution. 11/16/18RP 28-29. The State did not register any disapproval of Dr. Sharrette conducting the evaluation beforehand, and even afterward, it could not articulate specific problems or failings with the evaluation.

When the court asked the prosecution to explain its good faith basis for refiling charges, it insisted it was not relying on its complaints about Western State Hospital evaluators. Instead, it offered the factual claims that Mr. Slye is "doing math," acting socially on the ward, and Western State Hospital was considering releasing him. 1/11/19RP 18-19. The court rejected these claims as factually inaccurate and essentially irrelevant to Mr. Slye's likely competence to stand trial.

Mr. Slye's efforts to do math homework and obtain a high school diploma do not show an improvement in his competency. Mr. Slye was doing elementary school worksheets, focusing on fourth grade level learning. CP 257. Even then, he "would often get many items wrong." *Id.* Dr. Sharrette reviewed one worksheet and noticed it "had half of the items incorrect." *Id.* Mr. Slye's teacher said getting half of the answers wrong was "not uncommon" for Mr. Slye. *Id.* Mr. Slye's teacher was helping him earn credits by relying on his IEP because this allowed him to receive credit solely based on "effort, time on task, and attendance." CP 256. He did not need correct answers to get credits for school.

The potential that Western State Hospital would transition Mr. Slye out of total confinement in its civil commitment also does not show a change in his ability to attain competency. The reason Western State Hospital was considering his release from civil commitment was not surprising, because as Dr. Sharrette explained, "his deficits are not amenable to treatment with psychiatric medication; they are due to a

cognitive limitation.” CP 224; *see* CP 390 (“he does not have a mental health diagnosis”).

The hospital would not release him until it found a safe place to house him. CP 342. In addition, he would not be released until the End of Sentence Review Board ascertained the safety of release, as the prosecution conceded when it refiled charges. CP 179; 1/11/19RP 28-29. As the trial court told the prosecution, if it believes Mr. Slye is dangerous and should not be released, it should urge Western State Hospital to continue his civil commitment. 1/11/RP 47. However, Western State Hospital’s desire to transition him into another safe location does not reflect an improvement in his ability to understand legal concepts or communicate with his lawyer as necessary to be competent for trial.

This information about Mr. Slye’s current functioning is no different than other information presented by other evaluators who have expertise in competency assessments. Those evaluations document Mr. Slye’s basic inability to understand the concepts essential to being competent to stand trial and a further inability to communicate information

necessary to his defense. He is “extremely low functioning.” CP 244 (progress note from August 6, 2018). He performed in the “Extremely Low range” on a verbal comprehension test in June 2018. CP 247. He is “far behind” his peers in “almost all areas of life” and “[t]his is not likely to change.” CP 247. In November 2018, he could not name the charge he faced when asked, did not understand a judge’s role, and could not explain what “evidence” was. CP 248. He has “[s]ignificant language disabilities” that further “impair his ability to share information as well as comprehend information offered to him.” CP 251.

The prosecution claimed treatment provider Paula van Pul said Mr. Slye seemed “wily like a fox.” 1/11/19RP 10, 17. But Dr. Van Pul admitted she was not trained in conducting competency evaluations. CP 423; 1/11/19RP 16, 42. She also agreed Mr. Slye has an intellectual disability and “his verbal comprehension is limited.” CP 448 (Finding of Fact 17); *see* CP 392 (copy of email). “He has difficulty with concepts that have more than one simple idea.” *Id.* Dr. van Pul concluded, “he is as far as he can go in understanding the issues that brought him here.” *Id.*

Even though the prosecution is not appealing the competency decision, it tries to cast doubt on prior evaluations by claiming it believes Mr. Slye “understands” more than experts say he does. Opening Brief at 11. But it cites an older detective’s report where Mr. Slye said he had been incompetent in another case and the charges were dropped. *Id.* The prosecution implies this shows Mr. Slye understands the law.

But the prosecution does not mention that a trial judge has wide discretion to determine an accused person’s competence and it relies on an array of information to assess it, including the person’s physical appearance and engagement while present in court. *Ortiz-Abrego*, 187 Wn.2d at 402. The court’s decision to trust the opinions of qualified psychologists over a detective’s remarks or a prosecutor’s opinion was not manifestly unreasonable. *Id.*; see *State v. Kidder*, 197 Wn. App. 292, 316, 389 P.3d 664 (2016) (“A trial judge has wide discretion, and we defer to the trial court’s judgment of a defendant’s mental competency.”).

Numerous experts in developmental disability have evaluated Mr. Slye. None have found him competent to stand

trial. CP 443-47 (Findings of Fact 2, 3, 4, 5, 6, 7, 12, 13).

Instead, his intellectual impairment is evident by his cognitive delay and communication difficulties and is a long-standing obstacle. Dr. Sharrette's July and December 2018 evaluations recount in detail Mr. Slye's inability to understand, remember, and discuss the legal concepts necessary for a person to have the rational understanding and present ability to consult with counsel required for competency to stand trial. *Dusky*, 362 U.S. at 402.

Mr. Slye's disability stems from cognitive issues that are not readily rectified or minimized, unlike the delusions that caused the defendant in *Carneh* to be temporarily incompetent while doctors sought an appropriate medication regime. CP 251. At "any stage" of the proceedings, if the court finds a person is not reasonably likely to attain competency, the charges "shall be dismissed without prejudice." RCW 10.77.086(4).

The court accurately applied the law and acted within its discretion when it concluded the prosecution had not proven it had a good faith basis to conclude Mr. Slye was reasonably

likely to become competent with further restoration efforts,
requiring dismissal of the charges without prejudice.

5. The prosecution misrepresents the decision entered by Judge Arend to claim Judge Culbertson improperly overruled the prior judge.

The prosecution presents a puzzling challenge to Judge Culbertson's ruling, claiming he "in effect" overruled Judge Arend's ruling, and judges are supposed to defer to other judges, under local rules and out-of-state precedent. Opening Brief at 24-25. However, Judge Arend did not enter any ruling contrary to Judge Culbertson's determination that there was no basis to re-file the charges.

The parties appeared before Judge Arend on November 16, 2018, shortly after the prosecution refiled its charges against Mr. Slye, ex parte and without notice to defense counsel.

11/16/18RP 4. The prosecution set the November 16, 2018, hearing to ask the court to order a competency evaluation for Mr. Slye. 11/16/18RP 3. It pressed the court to take no further action in the case other than ordering a competency evaluation.

11/16/18RP 3, 12.

The prosecution specifically insisted Judge Arend should not address whether there was a basis to refile the charges. 11/16/18RP 12, 15. It told the court that the question of whether the State had a good faith basis to refile charges would be addressed at a later hearing and was not before the court. *Id.*

In response, the defense objected to the refiling, requested discovery to learn the basis of the refiling decision, and objected to the State's request that the court order Mr. Slye submit to a competency evaluation performed by the prosecution's expert of choice. 11/16/18RP5, 10, 20, 24.

Judge Arend disagreed with defense counsel's argument that the court was statutorily barred from appointing an evaluator that the State suggested, as opposed an evaluator designated by DSHS. 11/16/18RP 24-25. Judge Arend explained that by statute, the court had the option of either appointing a qualified expert or requesting the secretary designate such an expert to conduct a competency evaluation. *Id.*; *see* RCW 10.77.066(1)(a).

Judge Arend refused the prosecution's request to appoint the expert it asked for because the State had not established he

had the necessary qualifications. 11/16/18RP 28. Instead, Judge Arend ordered the secretary to designate a qualified person to conduct the evaluation, noting that the statute also gives the prosecution the right to approve of this person. 11/16/18RP 29.

On appeal, the prosecution contends Judge Arend made a broader ruling that was somehow contrary to Judge Culbertson's findings and conclusions and deprived the State of due process. Opening Brief at 24. But the two judges addressed different issues, and the prosecution had insisted Judge Arend should not address any other issues beyond ordering a competency evaluation.

The prosecution appears to construe Judge Arend's competency order under RCW 10.77.060(1)(a), which directs a judge to order a competency evaluation "whenever" competency is in doubt, as a definitive finding that by refileing charges, the State initiates a brand new case. Opening Brief at 25. It claims that any new case automatically entitles the prosecution to a new 90-day restoration period. *Id.* This contention is legally incorrect.

The court's authority to order an incompetent person be detained for restoration stems from RCW 10.77.086, not RCW 10.77.060 . Mr. Slye had the competency evaluation as the court ordered under RCW 10.77.060.

A court is never statutorily required to order an incompetent person detained for restoration. RCW 10.77.086(1)(a)(i) directs a court to order a restoration period of “no longer than” 90 days for a person who is incompetent, but it does not require a court to order it. If the court determines the defendant is unlikely to regain competency, it may dismiss the charges without prejudice, without any restoration period. RCW 10.77.086(1)(c). The statute does not dictate to court must a 90-day restoration period, even at the outset of a criminal case. *Id.*; see RCW 10.77.086(4) (if “at any stage,” court finds defendant “unlikely to regain competency, the charges shall be dismissed without prejudice”).

Restoration is never mandatory under the controlling statute and based an accused person's substantive due process rights. *Jackson*, 406 U.S. at 724, 738; RCW 10.77.086(1)(c) & (4). As a matter of due process, the court may not order the

detention of a person who is accused of a crime but incompetent to proceed when it does not have a reasonable basis to believe this additional time would lead to the person being rendered competent. *Jackson*, 406 U.S. at 724, 738.

The court found no reasonable basis to believe another restoration period was likely to lead to Mr. Slye's competence. Accordingly, Judge Cuthbertson appropriately ruled the refiled charges should be dismissed without prejudice and Mr. Slye should not be detained for restoration. Judge Arend's ruling does not conflict with the separate legal question before Judge Cuthbertson.

6. The court's ruling is supported by the law and factual record and should be affirmed.

Presented with evidence that multiple evaluators have concluded Mr. Slye's long-standing intellectual deficits and communication impairments cause Mr. Slye's inability to rationally understand the legal system or assist in his defense, the court properly found there is no good-faith basis to conclude he would become competent with another 90-day restoration

detention. *See Hand*, 192 Wn.2d at 300. The court appropriately ordered the charges dismissed without prejudice.

E. CONCLUSION.

The court acted within its discretion and based on settled law when it concluded the prosecution had not presented a good-father basis to refile charges that were dismissed due to Mr. Slye's incompetence to stand trial. The court's decision should be should be affirmed.

DATED this 11th day of October 2019.

Respectfully submitted,



NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Respondent
nancy@washapp.org
wapofficemail@washapp.org

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

STATE OF WASHINGTON,)	
)	
Appellant,)	
)	NO. 53048-1-II
v.)	
)	
AKEEM SLYE,)	
)	
Respondent.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF OCTOBER, 2019, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** TO BE FILED IN THE COURT OF APPEALS - DIVISION TWO AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> TERESA CHEN, DPA [PCpatcecf@co.pierce.wa.us] [teresa.chen@piercecountywa.gov] PIERCE COUNTY PROSECUTOR'S OFFICE 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	() () (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
<input checked="" type="checkbox"/> AKEEM SLYE WESTERN STATE HOSPITAL WARD E4 9610 STEILACOOM BLVD SW LAKEWOOD, WA 98498	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF OCTOBER, 2019.



X _____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

October 11, 2019 - 4:19 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53048-1
Appellate Court Case Title: State of Washington, Appellant v. Akeem I. Slye, Respondent
Superior Court Case Number: 18-1-00029-9

The following documents have been uploaded:

- 530481_Briefs_20191011161907D2684745_8843.pdf
This File Contains:
Briefs - Respondents
The Original File Name was washapp.101119-05.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- teresa.chen@piercecountywa.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Nancy P Collins - Email: nancy@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20191011161907D2684745