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NO. 53111-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY HAND,
Appellant.

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

The Honorable Jack Nevin, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The trial court erred by denying Mr. Hand's motion to dismiss for violation of his substantive due process rights when the state detained Hand in jail for 35 days longer than the trial court's order for competency evaluation allowed under RCW 10.77.068.

Issue Presented on Appeal

1. Did the trial court err by denying Mr. Hand's motion to dismiss when the Court detained him in jail for 35 days longer than the trial court's order for competency evaluation allowed in violation of his substantive due process rights?

B. STATEMENT OF THE CASE

Anthony Hand is a 53-year-old homeless man with a long history of mental health and substance abuse issues. CP 126-27; 8/20/18 RP 6-7. Since 2004, Mr. Hand has been evaluated by Western State for competency five times. CP 19-21, 122-26. In 2015, Mr. Hand spent 45-days in Western State for a competency restoration. CP 126. Mr. Hand has also been treated for depression, anxiety, and Antisocial Personality Disorder during his lifetime. CP 126-27.

Police arrested Mr. Hand after he tripped the alarm entering a window at the Spanaway Lutheran Church, in search of a restroom and toilet paper. CP 1. The state charged Mr. Hand with one count of Burglary in the Second Degree. CP 2. The trial court ordered Mr. Hand to undergo an in-custody competency evaluation. CP 3-9.

Psychologist Dr. Rob Saari attempted to perform a forensic psychological evaluation on Mr. Hand, but Mr. Hand terminated the evaluation after only a few minutes. CP 17; 10/1/18 RP 6. Nevertheless, Dr. Saari provided a report concluding that Mr. Hand was competent to stand trial based on a review of prior competency evaluations from 2004, 2014, and 2015:

Given the available evidence, Mr. Hand is not suffering from acute symptoms of a mental disease or defect that render him incapable of understanding the nature of the proceedings against him or incapable of assisting in his own defense. He may be unwilling to assist in his defense, but he is not incapable.

CP 17-22, 26. Based on this report, the parties agreed that Mr. Hand was competent to stand trial and the trial court entered an order finding him competent. CP 12-13.

The trial court held an omnibus hearing on October 1, 2018 where Mr. Hand moved to have his court-appointed trial counsel

removed from his case. 10/1/18 RP 3. Mr. Hand alleged a conspiracy to incarcerate him by his trial counsel, the jail, and the prosecutor's office, and made several accusations of misconduct against elected officials in Pierce County. 10/1/18 RP 3-5.

The state raised a concern about competency and the trial court ordered a second competency evaluation to be performed at Western State Hospital. CP 29-35; 10/1/18 RP 5-6. The trial court's second order for a competency evaluation stated that Mr. Hand "shall be admitted to the hospital within 7 days of signing this order for a period of commitment of up to 15 days from the time of admission." CP 33.

Mr. Hand was not admitted to Western State within 7 days of the trial court signing its second order for competency evaluation and instead remained incarcerated in the Pierce County Jail. 11/7/18 RP 1-2; CP 63. Mr. Hand's trial counsel filed a motion to show cause for why he had not been transported and a motion to dismiss. CP 45-62. Mr. Hand filed his own motion to dismiss without prejudice and asked the court to reserve the issue of his prolonged detention for appeal. CP 41-44.

The trial court held a hearing on Mr. Hand's motions on

November 7, 2018. CP 63. At that hearing, the trial court found the Department of Social and Health Services (DSHS) in contempt for failing to timely transport Mr. Hand but denied both motions to dismiss. CP 63. Mr. Hand was eventually transported to Western State on November 12th, which is 35 days after the trial court's deadline to transport. 11/7/18 RP 1.

On November 20, 2018, Dr. Eden Beesley performed a forensic psychological evaluation of Mr. Hand at Western State. CP 123. Mr. Hand fully participated in this evaluation and was found competent to stand trial. CP 123. Dr. Beesley ultimately diagnosed Mr. Hand with Antisocial Personality Disorder and substance abuse disorder but found him competent to stand trial. CP 139. The parties agreed and the trial court entered an order finding him competent. CP 143-44.

In exchange for a plea, the state amended the charge to Possession of Stolen Property in the Second Degree and recommended for a Drug Offender Sentencing Alternative (DOSA). CP 217; 12/21/18 RP 2-3. Mr. Hand plead guilty and the court imposed a 25-month DOSA sentence. 12/21/18 RP 7-8; CP 239-40. Mr. Hand Mr. Hand filed a timely notice of appeal. CP 261-64.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT DENIED MR. HAND'S MOTION TO DISMISS BECAUSE THE STATE INCARCERATED HIM FOR 35 DAYS BEYOND THE RESTORATION PERIOD ALLOWED BY THE TRIAL COURT'S ORDER

a. The state violated Mr. Hand's Substantive Due Process rights

“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects. *United States v. Trueblood*, 822 F.3d 1037, 1042 (9th Cir. 2016) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001) (setting presumptively reasonable time limits on immigration detention)).

“No incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as the individual remains incompetent.” RCW 10.77.050. “Constitutional questions pertaining to the pretrial confinement of incompetent criminal defendants are analyzed under the due process clause of the Fourteenth Amendment.” *State v. Hand*, 192 Wn.2d 289, 295, 429 P.3d 502 (2018) (citing *Jackson v. Indiana*, 406 U.S. 715, 731,

92 S.Ct. 1845, 32 L.Ed.2d 435 (1972)).

In determining whether a defendant's substantive due process rights have been violated, courts balance the defendant's liberty interests against the interests of the state. *Hand*, 192 Wn.2d at 295-96. Incompetent criminal defendants have a liberty interest in receiving restorative treatment and to be free from incarceration. *Hand*, 192 Wn.2d at 296 (citing *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1120 (9th Cir. 2003)).

The relevant question in evaluating whether an incompetent defendant's substantive due process rights were violated is whether the nature and duration of the defendant's detention is reasonably related to the purpose for which he was committed. *Hand*, 192 Wn.2d at 296. Washington courts have adopted federal precedent holding that "committed persons must receive mental health treatment that gives them a realistic opportunity for restoration or improvement and that a lack of funds or facilities does not justify a hospital's failure to provide such treatment." *Hand*, 192 Wn.2d at 297 (citing *Mink*, 322 F.3d at 1121).

Detaining incapacitated defendants for "weeks or months" violates their substantive due process rights because "the nature

and duration of their incarceration bear no reasonable relation to the evaluative and restorative purposes for which courts commit those individuals.” *Hand*, 192 Wn.2d at 297 (citing *Mink*, 322 F.3d at 1122). Holding defendants in jail directly conflicts with the goal of competency restoration:

Each additional day of incarceration causes further deterioration of class members' mental health, increases the risks of suicide and of victimization by other inmates, and causes illness to become more habitual and harder to cure, resulting in longer restoration periods or in the inability to ever restore that person to competency.

Hand, 192 Wn.2d at 297-98 (quoting *Trueblood v. Dep't of Soc. & Health Servs.*, 101 F.Supp.3d 1010, 1022 (W.D. Wash. 2015) (*Trueblood II*)) (overruled on other grounds by *Trueblood*, 822 F.3d at 1042). Due to this concern, the *Trueblood* court entered a permanent injunction requiring that incompetent defendants in Washington be admitted for an evaluation within 7 days of the trial court's order. *Trueblood II*, 101 F.Supp.3d at 1023-24.

The Washington State Legislature adopted the *Trueblood* injunction's requirements by enacting RCW 10.77.068. This statute limits the sets a performance target of seven days for DSHS to offer admission to a defendant in need of a competency evaluation and specifies a “maximum time limit” of 14 days. RCW

10.77.068(1)(a)(i).

In this case, the state violated RCW 10.77.068. This case represents the second time Mr. Hand has been incarcerated for an excessive period of time while waiting for a competency evaluation in violation of his right to due process and the *Trueblood* injunction. In Mr. Hand's first case, the trial court ordered him to undergo restoration at Western State for up to 45 days and allowed 15 days for transport. *Hand*, 192 Wn.2d at 292. Mr. Hand was not transported to Western State until (61) days after the 15-day deadline for transport had passed. *Hand*, 192 Wn.2d at 293, 298.

In *Hand*, the Washington Supreme Court held that the state's act of incarcerating Mr. Hand for 69 days beyond the 7 day statutory limit for a competency evaluation violated his substantive due process rights (61 days beyond 15 court order). *Hand*, 192 Wn.2d at 298-99. The court held that this prolonged detention was not related to the goal of restoring competency, and therefore Mr. Hand's interests in receiving restorative treatment and being free from incarceration outweighed the state's interest in prosecuting him. *Hand*, 192 Wn.2d at 298-99.

In this case, the trial court ordered the state to transport

Hand to Western State within 7 days from October 1, 2018. CP 33. Despite the October 8 deadline, the state did not transport Mr. Hand for his evaluation until November 12th. 11/7/18 RP 1. Thus, the state incarcerated Mr. Hand in the Pierce County Jail for 35 days beyond what the trial court had ordered, and well beyond the statutory “maximum time limit” of 14 days codified in RCW 10.77.068. There is no substantive difference between this 35-day detention and the 61-day detention held to violate Mr. Hand’s due process rights in his first case.

In both cases, Mr. Hand had a liberty interest in receiving restorative treatment and being free from incarceration. Those interests were violated when he was subjected to a prolonged period of incarceration as he waited for transport to Western State. This procedure “harms a defendant's mental health and runs counter to the very purpose for which he was committed—which is to restore the defendant's competency.” *Hand*, 192 Wn.2d at 298 (citing *Mink*, 322 F.3d at 1121). Mr. Hand’s current detention was not reasonably related to restoring his competency; thus, it violated his substantive due process rights.

b. The proper remedy is dismissal of the charge

The government committed misconduct by failing to timely obtain a competency evaluation for Mr. Hand. This Court should dismiss this case with prejudice for governmental misconduct.¹

i. CrR 8.3(b)

CrR 8.3(b) the trial court “may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial.” *Id.* The governmental misconduct need not be evil or dishonest, simple mismanagement is sufficient. *State v. Kone*, 165 Wn. App. 420, 423-24, 266 P.3d 916 (2011); *State v. Flinn*, 119 Wn. App. 232, 247, 80 P.3d 171 (2003). The movant must establish actual prejudice. *Kone*, 165 Wn. App. at 433. A trial court’s decision on a motion to dismiss under CrR 8.3(b) is reviewed for an abuse of discretion. *State v. Beito*, 147 Wn. App. 504, 508, 195 P.3d 1023 (2008).

Mr. Hand suffered actual prejudice by the government’s mismanagement of his case because “[e]ach additional day of

¹ Dismissal without prejudice is not a remedy for Mr. Hand because he has been detained in violation of his due process rights. *Hand*, 192 Wn.2d at 298-99.

incarceration causes further deterioration of class members' mental health, increases the risks of suicide and of victimization by other inmates, and causes illness to become more habitual and harder to cure, resulting in longer restoration periods or in the inability to ever restore that person to competency.” *Hand*, 192 Wn.2d at 297, (quoting *Trueblood II*, 101 F.Supp. 3d at 1022).

Hand, like any other detainee cannot recoup the deterioration he suffered while being unlawfully detained for 35 days in violation of his due process rights. Mr. Hand was left to languish in jail, creating an increased risk of suicide and destabilization. *Id.* Just as in *Trueblood*, this delay was inexcusable, harmful and ultimately prejudicial.

A dismissal under CrR 8.3(b) is justified where the state's misconduct violates the defendant's right to due process “fundamental conceptions of justice which lie at the base of our civil and political institutions.” *State v. Moen*, 150 Wn.2d 221, 226, 76 P.3d 721 (2003) (quoting *United States v. Lovasco*, 431 U.S. 783, 790, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977) (other citations omitted)).

In *State v. Martinez*, 121 Wn. App. 21, 33, 86 P.3d 1210

(2004), the Court dismissed charges with prejudice holding that when the state withheld exculpatory evidence until the middle of a criminal jury trial, the action was “so repugnant to principles of fundamental fairness that it constitutes a violation of due process.” *Martinez*, 121 Wn. App. at 35.

Withholding Brady material undermines due process. *Martinez*, 121 Wn. App. at 35. Detaining Mr. Hand unlawfully violated his due process rights. *Hand*, 192 Wn.2d at 297. Just as in *Martinez*, Incarceration is as repugnant to fundamental fairness as withholding exculpatory material. Both warrant dismissal with prejudice.

Here, the inadequate staffing does not justify the delay, because, “a “lack of funds, staff, or facilities cannot justify the State's failure to provide [incompetent defendants] with [the] treatment necessary for rehabilitation.” *Mink*, 322 F.3d at 1121.

The state’s failure to adequately staff, fund, or provide for the timely transportation of incompetent defendants is governmental misconduct that prejudiced Mr. Hand because he suffered mental deterioration while unlawfully detained in jail. The state’s mismanagement of its own system for restoring competency is not

a lawful basis to incarcerate Mr. Hand beyond what was allowed by a court order. The fact that Mr. Hand was forced to remain in jail without restorative treatment for over a month past the deadline imposed by the trial court violated his right to substantive due process and entitles him to dismissal of the charge with prejudice under CrR 8.3(b).

D. CONCLUSION

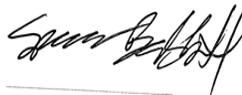
The trial court erred when it denied Mr. Hand's motion to dismiss for governmental misconduct even though he was jailed for 35 days past the court-ordered deadline for transport. This detention prejudiced Mr. Hand's right to a fair trial and entitles him to dismissal of the charge with prejudice under CrR 8.3(b).

DATED this 2nd day of July 2019.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office pcpatcef@co.pierce.wa.us and Anthony Hand, 22918 149th Avenue S, Graham, WA 98338a true copy of the document to which this certificate is affixed on July 2, 2019. Service was made by electronically to the prosecutor and Anthony Hand by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written on a light-colored rectangular background.

Signature

LAW OFFICES OF LISE ELLNER

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