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Court of Appeals
Division III
State of Washington

NO. 30003-0-III

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

STATE OF WASHINGTON,

RESPONDENT,

v.

BLAYNE J. COLEY,

APPELLANT.

RESPONDENT'S BRIEF

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecuting Attorney's Office, is the Respondent herein.

II. RELIEF REQUESTED

Reversal is not warranted and the Appellant's convictions must be affirmed.

III. ISSUES

1. Whether Mr. Coley was prejudiced by the burden of going forward when the trial court conducted a full hearing and made an affirmative ruling that the appellant was competent.
2. Whether the record supports appellant's assertion that his request(s) to proceed *pro se* was not honored by the trial court.

IV. STATEMENT OF THE CASE

On June 17, 2008, deputies of the Grant County Sheriff's Office (GCSO) were dispatched to a reported domestic at 4815 Airway Drive in Moses Lake, Washington. 12/16/10 RP 243. At the scene, in the course of determining what had occurred, Mr. Coley told Deputy Mansford, post

Miranda, that he had been molested by his stepson, S.U., specifically referencing an incident in which Mr. Coley had allowed S.U. to sodomize him. 12/16/10 RP 245. In response to this revelation, GCSO Detective Ryan Rectenwald interviewed S.U. who described two different instances of intercourse between himself and Mr. Coley. 12/16/10 RP 311-314. Based on the statements by both Mr. Coley and S.U., as well as additional investigation conducted by GCSO, Mr. Coley was charged with two counts of Rape of a Child in the Second Degree in violation of RCW 9A.44.076. CP 1.

Prior to trial, Mr. Coley was seen at Eastern State Hospital due to concerns about his competency. An order of competency was entered on December 9, 2008. 06/11/10 RP 8. However at a subsequent hearing on April 20, 2009, the court again had some questions about Mr. Coley's competency, and ordered additional evaluations be performed. *Id.* 04/20/09 RP 16. On November 3, 2009, defense counsel for Mr. Coley indicated that the defense evaluator disagreed with the recent assessment received from Eastern State Hospital. 11/03/09 RP 1, 2. However counsel also indicated that it was Mr. Coley's belief that he was competent. 11/03/09 RP 2. On November 9, 2009, when addressing whether or not a

competency hearing should be held, counsel for Mr. Coley, Mr. Perry, cited to Volume 12, section 907 of *Washington Practice* and stated:

‘the accused has the burden of showing he or she is incompetent to stand trial by a preponderance. This proof requirement is based on the presumption of sanity. At the hearing’ the next paragraph, ‘the experts or professional persons who joined in the report may be called as witnesses. The prosecution and defendant may both summon any other qualified expert or professional to testify.’ And they cite 10.77.010. ‘The rules of evidence are applicable at the hearing.’ That’s.... 11/09/09 RP 3.

The court then went on to discuss scheduling.

On June 11, 2010, a competency hearing was held. The issue of whose burden of proof it was to show the incompetency of Mr. Coley was raised, and the State indicated that it believed based on a reading of Volume 12, section 907 of *Washington Practice*, that it was Mr. Coley’s. 06/11/10 RP 6-10. Counsel for Mr. Coley withdrew his argument that the burden was on the State. 06/11/10 RP 10. The court then proceeded with the hearing. Initially, the court heard the testimony of Dr. E. Clay Jorgensen, a clinical psychologist in private practice. 06/11/10 RP 16, 17. Based on his review of materials and evaluation of Mr. Coley, Dr. Jorgensen believed that Mr. Coley understood the nature of the proceedings against him, but could not assist his attorney as Mr. Coley did not trust his attorney. 06/11/10 RP 29, 30. Dr. Jorgensen also opined that

Mr. Coley's belief that he had been sexually coerced by his victim would impair Mr. Coley's ability to help in his defense. 06/11/10 RP 32. Dr. Jorgensen felt that Mr. Coley's fixed beliefs about what had happened and his belief that he was not guilty would impair Mr. Coley's ability to cooperate with any defense attorney. 06/11/10 RP 65. Dr. Jorgensen spoke with Mr. Coley twice, each time for close to two hours. 06/11/10 RP 48.

The court next heard from Dr. William H. Grant, a forensic psychiatrist employed by Eastern State Hospital. 06/11/10 RP 69. Dr. Grant described the extent of his contact as being about four hours "face to face", but indicated that he was:

also involved when he was an inpatient at Eastern, getting information from the entire staff there, his attending physician, psychologist, the social workers, the ward personnel who are trained and know what to look for, and we discussed this case quite a bit because of the diagnostic problems that it obviously has. 06/11/10 RP 72.

Dr. Grant disagreed with Dr. Jorgensen's opinion that Mr. Coley had a schizoaffective disorder. 06/11/10 RP 74. Dr. Grant's opinion was that Dr. Jorgensen's diagnosis suffered from his lack of long term exposure to Mr. Coley, and testified that:

...the problem is with that diagnosis that when you observe him over time, in situation to situation, have a couple of interactions with him, talk to other people who are interacting with him, see how he gets along with other patients, the diagnosis does not survive, because it does not have the persistence that's required for schizoaffective disorder. 06/11/10 RP 73.

Question: what type of persistence are we talking about?

Well, see schizoaffective disorder, it's a biochemical disorder. Okay? I've got a pill for it. If you don't take my pill, you are going to be disturbed for an extended period of time, could be months, could be longer than that, until it goes into some kind of spontaneous remission. You take the pill, it goes away – optimistically, you take the pill, it goes away. On the other hand, when a person's volatility is changeable from situation to situation, all right, then this is a reflection of his personality, kind of an instability of the personality rather than genuine mental illness. I do not believe Mr. Coley is mentally ill. 06/11/10 RP 74.

Dr. Grant concurred with Dr. Jorgensen's opinion that Mr. Coley understood the nature of the proceedings against him. 06/11/10 RP 86.

Where their opinions differed however, was in each man's opinion as to whether Mr. Coley could assist his attorney in his defense. Dr. Grant believed that Mr. Coley was capable of assisting in his defense, but might not be willing. *Id.* As Dr. Grant testified, Mr. Coley's attorney, Mr. Perry, was going to have to tell Mr. Coley some things that he did not want to hear. 06/11/10 RP 84, 123-125. Dr. Grant's information from the jail regarding Mr. Coley and his frame of mind immediately preceding this

proceeding did not change Dr. Grant's opinion as to Mr. Coley's competency. 06/11/10 RP 88, 89.

The court then viewed an approximately 57 minute video interview of Mr. Coley conducted by Dr. Grant. 06/11/10 RP 92. At the conclusion of the video, the court made additional inquiry of Dr. Grant. 06/11/10 RP 112-126.

Mr. Coley then took the stand and testified that he believed that he was competent. 06/11/10 RP 130. He testified that he understood the nature of the proceedings. 06/11/10 RP 130-133. And in response to a specific inquiry from the court, testified that he could provide his attorney with information and would cooperate with him and his decisions regarding Mr. Coley's case. 06/11/10 RP 135, 136.

The court also considered the October 1, 2009 report from Eastern State Hospital, as well as the reports prepared by Dr. Jorgensen. 06/11/10 RP 68. At the conclusion of the hearing, the court found that there was no disagreement that Mr. Coley understood the nature of the proceedings against him, and that after having considered the testimony of the two doctors and Mr. Coley, as well as the video interview of Mr. Coley, and

having observed Mr. Coley's demeanor in court, it was the court's opinion that Mr. Coley was competent to go forward. 06/11/10 RP 157-161.

A statement of facts regarding Mr. Coley's request(s) to go *pro se* are necessarily included in argument *infra*. and will not be unnecessarily repeated here.

V. ARGUMENT

A. THE APPELLANT CAN SHOW NO PREJUDICE FROM THE BURDEN OF GOING FORWARD WHEN THE TRIAL COURT CONDUCTED A FULL HEARING AND MADE AN AFFIRMATIVE RULING THAT THE APPELLANT WAS COMPETENT.

A perusal of Washington case law leaves the question of which party has the burden in a competency hearing unclear. Ferguson in Volume 12, section 907 of *Washington Practice, Criminal Procedure and Practice* (2004) citing *Medina v. California*, 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992), and *Cooper v. Oklahoma*, 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996), indicates that based upon the presumption of sanity, a defendant who is alleging incompetence to stand trial has the burden of showing such by a preponderance of the evidence. The paucity of guidance in this area is exemplified by the appellant's own brief which cites *State v. Heddrick*, 166 Wn.2d 898, 904, 215 P.3d 201

(2009) and *State v. Wicklund*, 96 Wn.2d 798, 805, 638 P.2d 1241 (1982) for the general proposition that proper procedure under RCW 10.77.060 must be followed in any proceeding for competency. That procedure as outlined by the statute was followed here with the provision of a full competency hearing before the tribunal with the presentation of reports and testimony from two experts, one of whom had been chosen by the defense. The other cases cited by appellant, *Born* and *Hurst* specifically address the situation of commitment proceedings regarding a defendant and the burden of proof necessary for a court to make such a commitment determination, and as such, are not applicable.

Although the defense bears the burden of demonstrating a *prima facie* case of incompetence to warrant a competency evaluation, it is not clear whether the defense maintains that burden or, rather, it shifts to the State during a competency hearing. *State v. Benn*, 120 Wn.2d 631, 661, 845 P.2d 289 (1993)(declining to decide which party holds the burden of proving competence or incompetence), *cert. denied*, 510 U.S. 944 (1993); *State v. Lord*, 117 Wn.2d 829, 903-904, 822 P.2d 177 (1991) (defense bears the threshold burden of establishing a reasonable question of competence).

An individual is presumed competent. Competency is defined as 1) the ability to understand the nature of the charges that the individual is facing, as well as 2) having the ability to assist his or her counsel in the presentation of his or her case. *In Re Pers. Restraint of Rhome* 172 Wn.2d 654, 260 P.3d 874 (2011), *State v. Ortiz*, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985). The trial court has wide discretion in judging the mental competency of a defendant to stand trial. *Ortiz* citing *State v. Dodd*, 70 Wn.2d 513, 424 P.2d 302 *cert. denied* 387 U.S. 948 (1967). Accordingly a trial court's decision will not be reversed unless it has abused its discretion. *See State v. Gwaltney*, 77 Wn.2d 906, 468 P.2d 433 (1970).

The law is unclear as to which party bears the burden, however both parties presented evidence to support their arguments. Any error is thus theoretical and not manifest. *State v. Kirkman*, 159 Wn.2d 918, 934-935, 155 P.3d 125 (2007).

**B. THE RECORD DOES NOT SUPPORT APPELLANT'S
ASSERTION THAT HIS REQUEST(S) TO APPEAR *PRO SE*
WAS NOT HONORED BY THE TRIAL COURT.**

A request to appear *pro se* must be unequivocal. *State v. Luvane*, 127 Wn.2d 690, 698-699, 903 P.2d 960 (1995), *State v. Woods*, 143 Wn.2d 561, 585-588, 23 P.3d 1046 (2001). A disagreement about trial

tactics between the attorney and client does not suffice. *State v. Stenson*, 132 Wn.2d 668, 730-743, 940 P.2d 1239 (1997).

A complete history of Mr. Coley's interactions with the court regarding his representation is as follows:

On February 5, 2009, the Court asked Mr. Coley if he wished to proceed *pro se*? Mr. Coley did not respond immediately, and then later made an equivocal request to do so. RP 5, 8. The Court indicated that it would go through the litany for his *pro se* request, but advised Mr. Coley against it, but then said should you go *pro se*, you should have standby counsel, to which Mr. Coley agreed. RP 9, 10.

On February 10, 2009, the Court engaged in the *pro se* colloquy with Mr. Coley and suggested that defense counsel, Mr. John Perry, remain as standby counsel. RP 5. Mr. Coley, himself, strongly suggested that he have standby counsel. RP 8. Mr. Coley was allowed to go *pro se* with Mr. John Perry as standby. RP 11.

On March 5, 2009, Mr. Coley conducted his CrR 3.5 hearing *pro se* with Mr. John Perry as standby.

On March 10, 2009, Mr. Coley asked to "resign" his *pro se* counsel and have Mr. John Perry once again represent him. RP 5.

On March 31, 2009, Mr. Coley briefly bemoans "why I didn't go *pro se*. Why I couldn't stick with *pro se*". RP 5

On April 20, 2009, Mr. Coley again moves to appear *pro se* and have standby counsel. RP 1. He then corrected himself and represented that he wanted to stand alone. RP 2. The Court suggested standby counsel which Mr. Coley refused. RP 6. The Court articulated its concern about Mr. Coley's competency and specifically noted that it did not feel comfortable addressing the issue until Mr. Coley had had a second evaluation, RP 13, 16.

N.B. This was the hearing at which the court ordered a second evaluation of Mr. Coley for purposes of a competency determination. RP 16.

On November 3, 2009, Mr. Perry sums up the history of his representation of Mr. Coley, and says that he is the defense counsel for Mr. Coley. Mr. Coley began to interject, but was cut off. RP 7.

On November 9, 2009, Mr. Coley indicated, not that he wanted to appear *pro se*, but that he wanted a different attorney all together to represent him. RP 7, 8.

On June 11, 2010, Mr. Coley took the stand at his competency hearing and reiterated that his *pro se* status with standby defense counsel had been in the past. RP 131. He then testified that he would help his counsel and cooperate with him. RP 135. Mr. Coley then asked to resume his *pro se* status. RP 140-142. The Court noted that the issue had not been properly raised and told Mr. Coley to bring the motion if he in fact wished to resume his self representation. RP 160-162.

On June 15, 2010, Mr. Coley told the Court that he wants his *pro se* motion held "in speculation". RP 4. The Court then specifically asked Mr. Coley do you want to hold off on your request?, to which Mr. Coley responded "yes", and reserved his right to self representation. RP 5, 6. He then went on to tell the Court that he would do his best to work with his defense attorney. RP 7.

On October 5, 2010, Mr. Coley told the Court that he "did put in a motion to speculate *pro se* on after I was awarded my competency hearing in April I believe is when it was this year. And as I note that the trial deadline is this Friday and now I speculate my order as *pro se* I would like to ask the court to acknowledge an oral request to order the court to move into demurrage. As being that I am not quite certain what the local rules I think it is 7.1 is for demurring but that would have to be something that would be up to your decision and that would be considered left to amend". The Court replied in part: "Okay as at times have been the case in the past Mr.

Coley uses legal terminology in a way that is incomprehensible to me". RP 3.

Later in the same hearing of October 5, 2010, Mr. Coley indicated that he understood the nature of the charges against him, and although he had some negative feelings towards Mr. Perry, he would do his best to assist him with Mr. Coley's defense. RP 11.

On November 30, 2010, Mr. Coley again raised the issue of his perceived conflict with counsel. RP 9.

On February 10, 2009, Mr. Coley's request to go *pro se* was unequivocal. It was granted by the Court, and Mr. Coley represented himself for purposes of the 3.5 hearing. On March 10, 2009, Mr. Coley asked to retract his *pro se* request and have Mr. Perry once again fully represent him. On April 20, 2009, Mr. Coley again asked to appear *pro se*, but because a competency evaluation was pending, the Court held off on considering Mr. Coley's request. On November 9, 2009, Mr. Coley told the Court that he didn't wish to appear *pro se*, but that he desired different counsel to represent him. And finally, on June 15, 2010, Mr. Coley told the Court that he wished to have his *pro se* request put into "speculation", and in response to the Court's specific inquiry as to whether he wished to hold off on his request to appear *pro se*, Mr. Coley responded "yes".

There simply is no unequivocal request to appear *pro se* other than those made by Mr. Coley on February 10, 2009, and April 20, 2009. His

February 10, 2009, request was granted while his April 20, 2009, request was put into abeyance and then later abandoned by Mr. Coley. From this record, it is clear that the Superior Court honored Mr. Coley's request(s) to appear *pro se*, thus appellant's assertion that he was denied his right to represent himself is not supported by the record.

VI. CONCLUSION

Based upon the foregoing, the State respectfully requests this Court deny Mr. Coley's appeal and affirm his convictions.

DATED THIS 6th day of February, 2012.

Respectfully submitted:

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