

NO. 348598

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW SEAN MCCARTHY

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY
The Honorable Harold D. Clarke, III

APPELLANT'S OPENING BRIEF

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Revised Code of Washington

RCW 10.77.0509

RCW 10.77.060(1)(a)9

I. ASSIGNMENTS OF ERROR

1. The trial court violated the defendant's constitutional right to a fair trial when it allowed him to stand trial when there were reasons to doubt his competency.

2. The trial court abused its discretion when it neglected to order a competency evaluation, sua sponte, after testimony from the state and from the defendant revealed the defendant was no longer capable to assist his own defense.

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

After a jury found the defendant competent to stand trial, was the trial court presented with sufficient reasons to doubt whether the defendant's competency was still intact? (Assignments of Error 1 & 2)

III. STATEMENT OF THE CASE

Substantive facts

Matthew Sean McCarthy (Mr. McCarthy) a college-educated welder, was first diagnosed with bi-polar disorder when he was sixteen years old. 28/16 RP 646; 5/13/16 RP 703; 9/19/16 RP 156. 1/27/16 RP 378. Dr. Debra Brown (Dr. Brown), a clinical psychologist, later diagnosed Mr. McCarthy as bi-polar, with paranoid features, antisocial personality disorder, and a substance use disorder. 1/27/16 RP 380. She explained to the court how Mr. McCarthy was most affected by paranoid delusions about what happened, about what was going on around him, and about how people were against him unless they believed in this conspiracy theory or, in his mind, a conspiracy fact. 1/27/16 RP 406. And although medication was useful to treat this condition, it did not alleviate all symptoms. 1/27/16 RP 382-384; 1/27/16 RP 409.

By adulthood, Mr. McCarthy had amassed a lengthy criminal history that included two prior serious offense convictions. 5/13/16 RP 702; CP 1930-1941; CP 1922-1924. He had only been released from prison for two and a half weeks, when he was arrested again. 1/27/16 RP 351-52.

Events that led up to the arrest began about 9:30 one morning when Mr. McCarthy was driving down Mount Vernon Street, in Spokane, on his way to a friend's house. He noticed two cars he believed had been parked outside his home on Thor Street. He found it strange the same two cars parked on his street at Thor were now cars parked on Mount Vernon. So, he stopped and knocked on the door. 9/19/16 RP 157.

Mr. McCarthy had turned to leave, when a woman answered the door. He later described how the woman looked at him was as if she had recognized him. Mr. McCarthy told the court the woman screamed and tried to slam the door in his face. 9/19/16 RP 158-159. He surmised the only way she would have recognized him was if she had seen his face before from pictures in his ex-wife, Laura's, home. 1/28/16 RP 523; 7/15/16 RP 83. Convinced the woman and Laura were friends and Laura was inside the woman's house with another man, Mr. McCarthy blocked the door from closing, with his hand. He and the woman pulled and shoved on the door back and forth, until he finally overpowered her and pushed the door open. That's when the woman said, "Let me get my child and leave." 9/19/16 RP 159. Mr. McCarthy took that to mean the woman wanted no part of what would happen if he came in the house and found Laura there getting high with another man. 9/19/16 RP 204.

Mr. McCarthy insisted he never went inside the woman's house. He just returned to his car and left. 9/19/16 RP 179. The woman called police. But by the time an officer arrived, Mr. McCarthy was gone. 9/19/16 RP 58.

The woman gave police a different story. She told the officer she was at home with her two-year old daughter that morning, when Mr. McCarthy showed up. 9/19/16 RP 49. Mr. McCarthy asked for someone named Ellie and when she told him no one lived there by that name, he forced the door open and came inside. She later testified she couldn't remember whether he knocked her phone out of her hands or whether it flew out of hands, when the door flung open. 9/19/16 RP 56. She ran to the bedroom, where her daughter was, but could hear noise, like he was rummaging through the kitchen. When the noise stopped, she surfaced from the bedroom. She thought Mr. McCarthy was gone, but she saw him looking through her windows. 9/19/16 RP 64-68. Prior to that day, she had never seen Mr. McCarthy and insisted no one in her house knew Laura. 9/19/16 RP 52; 9/19/16 RP 60.

Mr. McCarthy returned to the woman's house the following evening, to look for Laura. 9/19/16 RP 162. This time when he knocked on door, the woman's boyfriend and her boyfriend's brother answered. Mr. McCarthy asked the boyfriend, if Laura was there. Mr. McCarthy told the court the boyfriend looked to his right, like he was interacting with someone and said, "Laura is not here right now," like it was a big joke. 9/19/16 RP 164. Mr. McCarthy returned to his car and left. 9/19/16 RP 165. The woman asked her boyfriend who was at the door. When her boyfriend described the man, the woman told him it was man the same man who broke in the morning before. She immediately called police. 9/19/16 RP 59.

Minutes later, Mr. McCarthy returned to the woman's house, a third time. 9/19/16 RP 165. This time, he just stopped his car, rolled down the window, and asked the boyfriend's brother, who was outside, if they had found his cellphone. The brother started to fidget, like he was about to attack Mr. McCarthy. So, Mr. McCarthy sped off. 9/19/16 RP 167.

Mr. McCarthy soon realized the woman's boyfriend, his brother, and few of their friends were chasing him in two separate cars. 9/19/16 RP 167. They chased him to a local gas station and kept him there until police arrived. 9/19/16 RP 168; 9/19/16 RP 60. The woman was later brought to the gas station. She identified Mr. McCarthy as the man who broke-in her house the previous morning and police arrested him. 9/19/16 RP 61; 9/19/16 RP 150-151.

Procedural facts

The state charged Mr. McCarthy with first-degree burglary, and served him notice of its intent to seek an exceptional sentence of life without the possibility of parole. CP 6-7; CP 26.

Shortly after his first court appearance, Mr. McCarthy's mental health had deteriorated to a point where the court ordered him to receive in-patient competency restoration treatments, three times. CP 292-294; CP 14-17; CP 27-28; 4/24/15 RP 16. At one point during these treatments, Dr. Daniel Lloyd-Flynn (Dr. Lloyd-Flynn) evaluated Mr. McCarthy. Tentatively, he had determined Mr. McCarthy was competent to stand trial. He believed Mr. McCarthy's delusions about Laura had subsided. Although Mr. McCarthy still housed strong feelings about his delusions, he was open to other information and could admit he could not prove his claims.

Dr. Lloyd-Flynn changed his opinion after Mr. McCarthy's attorney presented him with two letters Mr. McCarthy had written to her. He concluded Mr. McCarthy was not competent to stand trial and recommended he be treated in hospital, for more competency restoration treatment. 1/28/16 RP 527. Mr. McCarthy could tell during the evaluation Dr. Lloyd-Flynn knew about the letters he had written to his attorney and he became furious. 1/27/16 RP 354. He believed the letters were privileged information and almost immediately initiated a campaign to have her removed as his attorney. 1/27/16 RP 352-53; 1/28/16 RP 548-49. She explained to the court, it wasn't just that he did not like her, but rather he believed she conspired against him. 4/24/15 RP 4-8.

Mr. McCarthy opted for a jury to determine his competency. Both Dr. Brown and Dr. Lloyd-Flynn testified at his competency hearing. Although they agreed with his diagnoses, and with the fact he suffered from delusions and irrational thought, they differed as to whether he was competent to stand trial. 1/27/16 RP 380; 1/27/16 RP 500; 1/28/16 RP 578; 1/28/16 RP 632.

Dr. Brown told the jury Mr. McCarthy was not rational and could not assist in his defense. She explained how his beliefs about his attorney, about Laura, and about the woman, as all conspirators in his arrest and perhaps in conviction demonstrated paranoid delusions. 1/27/16 RP 415-416. Dr. Lloyd-Flynn disagreed. Because Mr. McCarthy as intelligent, well read, and able to rationalize different legal options and to understand the consequences of those options, he concluded Mr. McCarthy was competent to stand trial. 1/28/16 RP 552; 1/28/16 RP 561-564; 1/28/16 RP 575.

The jury found Mr. McCarthy competent to stand trial. The court arraigned Mr. McCarthy on the first-degree burglary charge, to which he pleaded not guilty, and appointed him new counsel. 1/28/16 RP 688; 1/28/16 RP 695; 1/28/16 RP 696.

A few months later, Mr. McCarthy appeared before the court convinced governmental and law enforcement misconduct had affected his stay at the county jail, where he had been subjected to minor harassments from correctional officers. He also complained how his new attorney did not take seriously the case he wanted investigated and argued before a jury. So, he asked to represent himself. 5/13/16 RP 701-702.

The court inquired as to Mr. McCarthy's education, his familiarity with the law and with criminal court rules, as well as whether he understood life without the possibility of parole would be the consequence should he be found guilty. 5/13/16 RP 703. The court considered some of the evidence brought up at his competency trial, and found he knowingly, voluntarily, and intelligently waived his right to an attorney. But, it ordered standby counsel to advise Mr. McCarthy, at trial, and to ask specific witnesses questions that Mr. McCarthy devised. 5/13/16 RP 710-712.

Almost instantly, the state raised concerns about Mr. McCarthy's mental health. It described for the court how Mr. McCarthy now believed Laura could have been working in the county jail mailroom and had thwarted his incoming and outgoing communications. He also believed jailers tried to use another inmate to plant narcotics in his cell. 5/13/16 RP 715.

The court considered the state's concerns, but upheld its decision to allow Mr. McCarthy to proceed pro se. The court noted, however, it would re-consider its decision

should there appear to be issues regarding Mr. McCarthy's competency. 5/13/16 RP 716. And there were other issues regarding Mr. McCarthy's competency.

Mr. McCarthy made a series of motions that included one to be assigned to a different part of the jail. He told the court as soon as he was authorized to represent himself, it seemed as if his jailers wanted to physically harm him. 6/24/16 RP 23. Mr. McCarthy described how for the last month and a half, he had been exposed to varying toxic fumes. At first, he thought the officers who he had problems with had poisoned his food. Then, he realized the smell was in his cell. 7/1/16 RP 119. He described one instance when the jail's sergeant came to his cell, under the pretense to discuss grievances he had filed. Fumes, so toxic, permeated his cell, and destroyed his cognitive skills. 6/24/16 RP 29-30.

He explained how the fumes were not isolated to his cell; they seemed to follow him throughout that part of the jail. He told the court about instance when he asked an officer for permission to view discovery he had requested. The officer told him he could only view the papers in a specific booth. The officer told Mr. McCarthy to bring a chair, so he could sit while he reviewed the papers. Mr. McCarthy told the court as soon as he sat down in the booth, he was overwhelmed by fumes and nearly passed out. He immediately asked to leave. He was so shaken by the experience, he never asked to see his discovery papers again. 6/24/16 RP 29-32.

Still there were other signs that questioned Mr. McCarthy's mental competency. Once again, the state described how it ascertained from papers Mr. McCarthy filed he was not only convinced the woman and Laura knew each other, but they were in a romantic relationship and had been in a romantic relationship while he was incarcerated.

He was certain they had conspired to create this charge, to remove him from the picture, so they could continue their ongoing romantic relationship. 7/15/16 RP 69-85; 7/15/16 RP 66; 7/15/16 RP 89. And when the state offered Mr. McCarthy a third-degree assault charge, if he pleaded guilty, instead of first-degree burglary, he rejected the offer outright. The maximum sentence for that would have been five years. 7/15/16 RP 96.

By this time, the court expressed its concern about Mr. McCarthy's ability to represent himself and afforded him one last opportunity to secure counsel. 7/15/16 RP 94. Mr. McCarthy relinquished his pro se status and agreed to allow standby counsel to return as his counsel. The court appointed standby counsel as counsel for the second time and the case went to trial. 7/15/16 RP 100-108.

A jury found Mr. McCarthy guilty of first-degree burglary and the court sentenced him to life without the possibility of parole. CP 1860. Mr. McCarthy appealed the conviction. CP 1952-1971.

IV. ARGUMENT

DELUSIONS ABOUT JAILHOUSE CONSPIRACIES, NOXIOUS GASSES, AND AN EX-WIFE'S RELATIONSHIP WITH A WOMAN WHO INSISTED SHE DIDN'T EVEN KNOW HIS EX-WIFE WERE SUFFICIENT REASONS FOR THE TRIAL COURT TO DOUBT MR. MCCARTHY'S COMPETENCY AGAIN.

Standard of review

A trial court has wide discretion to judge a defendant's mental competency to stand trial. For that reason, appellate courts will customarily defer to the trial court's judgment about a defendant's mental competency. State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985). Appellate courts will review a trial court's decision about a defendant's competency or, as here, its decision not to evaluate whether a defendant's

competency continues, for abuse of discretion. See State v. Gwaltney, 77 Wn.2d 906, 468 P.2d 433 (1970); State v. Coley, 180 Wn.2d 543, 551, 326 P.3d 702, 706 (2014).

Analysis

It is a fundamental principle of state and federal law that incompetent defendants may not stand trial. This right is protected by the due process clause of the Fourteenth Amendment. See U.S. Const. amend. XIV; Medina v. California, 505 U.S. 437, 439, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992). Our state law implements this due process protection by statute, RCW 10.77.050, which affords greater protection. It provides “[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” RCW 10.77.050; State v. Coley, 180 Wn.2d 543, 551, 326 P.3d 702, 706 (2014). “The failure to observe procedures adequate to protect this right is a denial of due process.” State v. O’Neal, 23 Wn. App. 899, 901, 600 P.2d 570 (1979) (citing Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966)).

The test to determine whether a defendant is competent to stand trial is whether he understands the nature of the charges, and is capable of assisting in his defense. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001) (citing State v. Hahn, 106 Wn.2d 885, 894, 726 P.2d 25 (1986); State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985)). RCW 10.77.060(1)(a) requires a competency hearing whenever there is “reason to doubt” a defendant’s competency. “‘A reason to doubt’ is not definitive, but vests a large measure of discretion in the trial judge.” City of Seattle v. Gordon, 39 Wn. App. 437, 441, 693 P.2d 741 (1985). “There are no fixed signs which invariably require a hearing, but the factors to be considered include evidence of a defendant’s irrational

behavior, his demeanor, medical opinions on competence and the opinion of defense counsel. State v. O’Neal, 23 Wn. App. 899, 902, 600 P.2d 570 (1979) (citations omitted).

For example, in State v. Marshall, 144 Wn.2d 266, 269, 27 P.3d 192, 194 (2001) abrogated by State v. Sisouvanh, 175 Wn.2d 607, 611, 290 P.3d 942 (2012), there was supportable evidence to show there was reason to doubt the defendant’s competency. A neurologist, a neuropsychologist, and a psychiatrist all testified the defendant suffered from brain damage, bipolar mood disorder, and paranoid schizophrenia, when he moved the court to withdraw his guilty plea. One doctor concluded the defendant was delusional and suffered from psychotic depression, when he pleaded guilty. Marshall, 144 Wn.2d at 271-72, 27 P.3d 192.

At the plea hearing the trial court engaged in a summary colloquy with the defendant, asking about his plea, his competency, the nature of his offense, the potential consequences of his decision, and whether he had discussed the issue with his attorneys. The trial court acknowledged the defendant clearly suffered from brain damage, but because he did not exhibit any signs of incompetency during the plea hearing, the trial court denied his motion to withdraw his guilty plea. Marshall, 144 Wn.2d at 280, 27 P.3d 192.

Our Supreme Court found the trial court abused its discretion and reversed its holding. It concluded there was “ample evidence” the defendant’s competency was in question, including undisputed evidence of brain dysfunction and atrophy, and expert testimony that the defendant was unable to waive his constitutional rights freely and voluntarily. Marshall, 144 Wn.2d at 281; State v. DeClue, 157 Wn. App. 787, 792-93, 239 P.3d 379 (2010).

There was reason to doubt the defendant's competency in State v. Lawrence, 166 Wn. App. 378, 380, 271 P.3d 280 (2012). Mental health experts variously diagnosed the defendant in that case with psychosis, antisocial personality disorder with narcissistic personality features, and bipolar disorder. When the defendant requested permission to represent himself, counsel for both parties questioned his competence and defense counsel advised the court his family believed he suffered from fetal alcohol syndrome. State v. Lawrence, 166 Wn. App. 382.

The court found the defendant competent and authorized him to represent himself. He served as the sole defense witness, and testified that he was on the other side of town robbing six men of their black diamonds at the time of the crimes. A jury convicted him, and he represented himself again at sentencing. State v. Lawrence, 166 Wn. App. 384.

On appeal before this court, the defendant argued, in part, the trial court erred when it found he was competent to stand trial and allowed him to represent himself. This court affirmed the trial court's decision. It found the trial court did not abuse its discretion because it deferred to expert opinion, instead of concerns about fetal alcohol syndrome from family members. State v. Lawrence, 166 Wn. App. 395. Later, in an unpublished opinion, this court granted the defendant post-conviction relief, based on a new mental health evaluation that confirmed fetal alcohol syndrome rendered him not competent to stand trial.

Just like there were reasons to doubt the defendants' competencies in Marshall and Lawrence, there were numerous reasons the court should have questioned Mr. McCarthy's competency. Both Dr. Brown and Dr. Lloyd-Flynn diagnosed Mr. McCarthy with bipolar disorder, with paranoid features. 1/27/16 RP 380; 1/27/16 RP 500. But after

a jury found him competent to stand trial, Mr. McCarthy's paranoia grew. He was convinced the state and law enforcement were behind what he deemed "minor harassments" from correctional officers, and behind a potential set-up where they tried to use another inmate to plant narcotics in his cell. 5/13/16 RP 701-702. He had also come to believe Laura could have infiltrated the jail's mailroom just to tamper with his communications. 5/13/16 RP 715.

Mr. McCarthy told the court after it authorized him to represent himself, it seemed someone at the jail wanted to harm him. He described for the court how he had been exposed to varying toxic fumes for weeks. At first, he thought certain correctional officers had poisoned his food. Then, he realized they were gassing his cell. 7/1/16 RP 119. He described one instance when the jail's sergeant came to his cell, under the pretense to discuss grievances he had filed. He was so overcome by toxic fumes, he couldn't speak. 6/24/16 RP 29-30.

He explained how those fumes followed him throughout that part of the jail. He told the court about instance when he asked an officer for permission to view discovery he had requested. The officer told him he could only view the papers in a specific booth. The officer told Mr. McCarthy to bring a chair, so he could sit while he reviewed the papers. Mr. McCarthy told the court as soon as he sat down in the booth, he was overwhelmed by fumes and nearly passed out. He immediately asked to leave. He was so shaken by the experience, he never asked to see his discovery papers again. 6/24/16 RP 29-32.

Mr. McCarthy's delusions about Laura and the woman had matured from them knowing each other to them being romantically involved. He was certain they had

conspired to have him arrested, so he would be sent to prison, and they could continue their relationship unfettered. 7/15/16 RP 69-85; 7/15/16 RP 66; 7/15/16 RP 89. He even rejected the state's offer to reduce the charge to third-degree assault, where the maximum penalty would be five years, because he believed he could prove his delusions were real. 7/15/16 RP 96.

These reasons were enough for the court to doubt whether Mr. McCarthy's competency was still intact, and to order, sua sponte, another competency evaluation. Granted, Mr. McCarthy is intelligent and he presented well in court. He was articulate and seemed to understand the nature of the charges against him. However, paranoia and delusions about his case and about what he could prove in court most certainly affected his ability to assist in his defense.

V. CONCLUSION

Given the reasons argued above, Mr. McCarthy asks this court to vacate his sentence and to remand for a new trial.

Submitted this 12th day of September, 2017.

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DECLARATION OF SERVICE

September 12, 2017

Court of Appeals Case No. 348598

Case Name: *State of Washington v. Matthew Sean McCarthy*

I declare under penalty and perjury of the laws of Washington State that on **Tuesday, September 12, 2017**, I filed an appellant's opening brief with Division Three Court of Appeals and served copies to:

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