

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Nov 26, 2012, 1:42 pm  
BY RONALD R. CARPENTER  
CLERK

No. 88111-1

E CPJ  
RECEIVED BY E-MAIL

THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Petitioner,

v.

BLAYNE COLEY,

Respondent.

---

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

---

ANSWER TO PETITION FOR REVIEW

---

GREGORY C. LINK  
Attorney for Respondent

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

**ORIGINAL**

TABLE OF CONTENTS

A. INTRODUCTION AND IDENTITY OF RESPONDENT..... 1

B. ISSUES PRESENTED ..... 1

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT..... 5

1. The Court of Appeals properly concluded that Due Process requires the State bear the burden of proof at a competency restoration hearing..... 5

2. If this Court grants review, the Court should review trial court’s refusal to address Mr. Coley’s request for self-representation ..... 11

E. CONCLUSION..... 15

## TABLE OF AUTHORITIES

### Washington Constitution

Const. Art. I, § 22 ..... 2, 11, 12

### United States Constitution

U.S. Const. amend XIV ..... 1, 2, 5

U.S. Const. amend. VI..... 2, 11, 12

### Washington Supreme Court

*Born v. Thompson*, 154 Wn.2d 749, 117 P.3d 1098 (2005)..... 10

*In re the Personal Restraint of Fleming*, 142 Wn.2d 853, 16

P.3d 610, (2001) ..... 8, 9

*State v. Heddrick*, 166 Wn.2d 898, 215 P.3d 201 (2009)..... 6

*State v. Hurst*, 173 Wn.2d 597, 269 P.3d 1023 (2012) ..... 7

*State v. Madsen*, 168 Wn.2d 496, 229 P.3d 714 (2010)..... 12, 14

*State v. Platt*, 143 Wn.2d 242, 19 P.3d 412 (2001)..... 8

*State v. Sisouvanh*, 85422-0, 2012 WL 4944801 (Oct. 18,  
2012)..... 8

*State v. Wicklund*, 96 Wn.2d 798, 638 P.2d 1241 (1982) ..... 10

### Washington Court of Appeals

*State v. Hurst*, 158 Wn.App. 803, 244 P.3d 954 (2010)..... 10

*State v. Vermillion*, 112 Wn.App. 844, 51 P.3d 188 (2002)..... 13

### United States Supreme Court

*Cooper v. Oklahoma*, 517 U.S. 348, 116 S.Ct. 1373, 134

L.Ed.2d 498 (1996)..... 5

*Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103

(1975)..... 5

*Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L. Ed. 2d

824 (1960)..... 5

*Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d

562 (1975)..... 12

*Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353

(1978)..... 12

### Statutes

RCW 10.77.050..... 7

RCW 10.77.060 ..... 6, 7

RCW 10.77.084 ..... 6, 10

**Court Rules**

RAP 13.4 ..... 1, 11, 12

A. INTRODUCTION AND IDENTITY OF RESPONDENT

Respondent Blayne Coley asks this Court to deny the State's petition for review because it does not meet the criteria of RAP 13.4. Alternatively, if this Court grants review, the Court should also grant review of the trial court's erroneous denial of Mr. Coley's motion to represent himself. That issue was presented to the Court of Appeals. However, because the Court of Appeals found the trial court had misallocated the burden of proof at the competency-restoration hearing it was unnecessary for the court to reach the self-representation issue.

B. ISSUES PRESENTED

1. United States Supreme Court cases permit the states to determine the procedures to employ in competency proceedings within constitutional limits. Thus, in a competency proceeding, compliance or lack thereof with state procedural requirements is in large part determinative of whether a person has been afforded due process as required by the Fourteenth Amendment. Washington courts have recognized that the competency procedures in RCW 10.77 require the State to carry the burden of proof. Did the Court of Appeals properly conclude that after a person is found incompetent due process requires

the State carry the burden of proving the person's competency has been restored?

2. The Sixth and Fourteenth Amendments and Article I, section § 22 guarantee a criminal defendant the right to represent himself so long as the request is timely, unequivocal, and knowingly and voluntarily made. Mr. Coley made repeated requests to represent himself beginning nearly 18 months prior to trial. Mr. Coley's requests were not equivocal nor accompanied by a request to delay trial. Where the trial court repeatedly deferred ruling on the motions without ever resolving the matter, did the Court deny Mr. Coley his right to represent himself?

C. STATEMENT OF THE CASE

When police officers answered calls regarding a heated argument between Mr. Coley and his girlfriend, Christine Hill, Mr. Coley volunteered that he had been sexually assaulted by Ms. Hill's then 13 year-old son, S.U. 12/16/10 RP 243-45. Officers arrested Mr. Coley.

Mr. Coley gave additional statements repeating his claims of victimization, and describing two incidents in which he and S.U.

engaged in sexual intercourse. 12/16/10 RP 320-23. In Mr. Coley's words, he allowed S.U. "to sodomize" him. *Id.* at 323.

Shortly after charges were filed defense counsel voiced to the court his concerns regarding Mr. Coley's competency. 7/8/08 RP 1. Based on counsel's concerns the court ordered Mr. Coley to undergo a competency evaluation at Eastern State Hospital. Following that evaluation the court found Mr. Coley competent. 12/9/08 RP 1.

At a hearing in February 2009, Mr. Coley made a motion to represent himself. 2/10/09 RP 5. After a brief colloquy the court granted that request. *Id.* at 5-12. The court appointed defense counsel as stand-by counsel. *Id.* at 11.

At a subsequent hearing Mr. Coley made a motion to "resign my pro se counsel" coupled with a motion to waive his presence at future hearings. 3/9/09 RP 3. The court promptly and with minimal comment reappointed counsel for Mr. Coley. *Id.* 3. The court did not rule on Mr. Coley's request to waive his presence.

Following yet another continuance, sought by defense counsel over Mr. Coley's objection, Mr. Coley requested that he be permitted to return to his pro se status. 3/31/09 RP 5; 4/20/09 RP 1. The trial court engaged in a brief conversation with Mr. Coley regarding his request.

4/20/09 RP 6-8. Following that conversation the court expressed its concern that Mr. Coley was not competent. *Id.* at 13. Thus, rather than rule on Mr. Coley's pro se request, the court referred him for further evaluation at Eastern State Hospital. *Id.* at 16.

On July 16, 2009, at the recommendation of the staff at Eastern the Court found Mr. Coley incompetent and ordered an additional 90-day commitment to permit possible restoration of competency. CP 38-39.

In October 2009, the court received a report from Eastern in which the staff opined Mr. Coley was now competent. 10/27/09 RP 2. Defense counsel, however, noted he had obtained a separate evaluation of Mr. Coley that concluded Mr. Coley was incompetent. 10/27/09 RP 1. The court responded that because the report from Eastern reached an opinion of competency there was no longer reason to doubt Mr. Coley's competency and thus the burden was on the defense to note a hearing and contest that conclusion. 10/27/09 RP 2.

After numerous continuances the court conducted a competency hearing on June 11, 2010. At that hearing the court determined that Mr. Coley had the burden of proving his continuing incompetency. 6/11/10

RP 9. Following the hearing the court determined Mr. Coley had failed to prove his continuing incompetency. CP 40-41.

A jury convicted Mr. Coley as charged. CP 61-62.

D. ARGUMENT

**1. The Court of Appeals properly concluded that Due Process requires the State bear the burden of proof at a competency restoration hearing.**

It is unquestionably a fundamental right not to be tried while incompetent. *Cooper v. Oklahoma*, 517 U.S. 348, 354, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996); *Drope v. Missouri*, 420 U.S. 162, 171-72, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) (accused person's competency to stand trial is "fundamental to an adversary system of justice"); U.S. Const. amend. XIV. A person is competent to stand trial only when he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and to assist in his defense with "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L. Ed. 2d 824 (1960) (internal quotations omitted).

Where a defendant's competency is at issue, a court must comply with the procedural requirements of RCW 10.77 in order to satisfy due process. *State v. Heddrick*, 166 Wn.2d 898, 904, n3, 215

P.3d 201 (2009). Those statutes require a court order a competency evaluation whenever there is reason to doubt the person's competency. RCW 10.77.060(1). If, following an evaluation a court determines the person incompetent, the court may order the person committed for efforts to restore his competency. RCW 10.77.084(1)(a). Following that restoration period, a court must hold a hearing to determine whether or not competency has been restored. RCW 10.77.084(1)(b)(c).

The question in this case is not, as the State suggests, which party bears the burden of proof at an initial hearing to determine whether a defendant is competent. Instead, because trial the court had already determined Mr. Coley was incompetent, CP 38-39, the only question presented is after a defendant has been found incompetent which party bears the burden of proving his competency has been restored. On that point, the State has offered no authority to support its view. Nor has the State offered any authority which contradicts the analysis of the Court of Appeals. In fact, the reasoning of the Court of Appeals is readily supported and dictated by the statutory structure governing competency proceedings.

Because competency proceedings arise out of criminal proceedings the process which is due is that set forth by relevant

statutes unless “it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”. *State v. Hurst*, 173 Wn.2d 597, 602-03, 269 P.3d 1023 (2012) (citations omitted). The State contends that a defendant must always bear the burden of proof because the law requires that a person is presumed competent. Petition at 5. From this premise, the State surmises that the burden must therefore always be on the defendant to prove his lack of competency as well as his continued incompetency after a finding that he is not competent to stand trial. Petition at 7.

However, that presumption does not appear anywhere in the language of RCW 10.77. Because the statutes alone dictate the procedure, and this presumption is not dictated by the statute, there is no basis to apply it in competency proceedings.

But even assuming such a presumption might be implied from the statutes, that presumption is rebutted once there is a reason to doubt the person’s competency. RCW 10.77.050 provides: “No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” RCW 10.77.060(1) provides that “[w]henver . . . there is reason to doubt his or her competency” the court must stay the proceedings until a determination

of competency has been made. *State v. Sisouvanh*, 85422-0, 2012 WL 4944801 at 6 (Oct. 18, 2012). Competency may not be waived. *In re the Personal Restraint of Fleming*, 142 Wn.2d 853, 864, 16 P.3d 610, (2001). To the extent presumptions exist, the only logical rule is, as the Court of Appeals found, that a person's mental state is presumed to remain unchanged until the court finds differently. Opinion at 10 (citing *inter alia*, *State v. Platt*, 143 Wn.2d 242, 251 n.4, 19 P.3d 412 (2001)). Thus, a person might be presumed competent until found incompetent, and too, an incompetent person is deemed incompetent until a court finds competency has been restored.

If the State were correct, and the supposed presumption of competency survived at every stage of the proceedings, a person would be presumed competent even as the court finds reason to doubt his competence. A person would be presumed competent even after a court issued a finding that the person was incompetent. Indeed, a finding of incompetence would be meaningless if the person were still presumed competent. And the State cannot posit any theory whereby Due Process permits the involuntary commitment of a person who is presumed competent. Instead, even assuming one could find the presumption in the statute, that presumption cannot survive once the court finds there is

reason to doubt competency. It follows that any such presumption cannot support the allocation of the burden of proving restoration on an incompetent defendant.

The State's theory also suffers many practical flaws. For example, if the State's expert believes a person is incompetent due to a mental illness yet the person maintains he is competent, perhaps as a manifestation of that very mental illness, the State's theory would require the person carry the burden of proving incompetency. Of course that person has no motivation to do so as he does not believe himself incompetent. As such, they may refuse to prove what the State's experts know to be true. And the result of this process is in essence a finding of competency by default, not based upon any proof at all but rather a failure even where the evidence if offered would readily do so.

Permitting a finding of competency by default is little different than permitting a finding of competency based upon the agreement of the parties. The latter is plainly not permitted by due process. *Fleming*, 142 Wn.2d at 864. The State has offered no explanation how the former comports with either the statute or the constitution.

But the State maintains

There is no reason that due process requires the burden of proof to shift . . . . With a new report from the same

agency that previously declared the defendant incompetent now declaring him competent, the burden should remain with the defendant to prove otherwise.

Petition at 8. That claim misses much. First, the State presupposes the defendant had the burden of proof at the initial hearing at which he was deemed incompetent. Cases interpreting the provisions of RCW 10.77 recognized the State bears the burden of proof throughout the proceedings. *State v. Wicklund*, 96 Wn.2d 798, 805, 638 P.2d 1241 (1982); *see also, Born v. Thompson*, 154 Wn.2d 749, 753-54, 117 P.3d 1098 (2005) (noting there was no dispute that State bore the burden of proof, rather the only dispute was what standard the State must satisfy); *State v. Hurst*, 158 Wn.App. 803, 811, 244 P.3d 954 (2010) (same), *affirmed*, 173 Wn.2d 597 (2012). *Wicklund* recognized the state must carry the burden of proof at the initial competency hearing. *Hurst* recognized the state bears the burden at second restoration hearing. There is nothing in the statutory scheme that suggests that in between the burden shifts to the defendant. Contrary to the State's belief the burden has not shifted at all.

Second, under the statute, the trial court alone, and not DSHS, is tasked with determining a person's competency. *See* RCW 10.77.084(1) ("If at any time during the pendency of an action and prior to

judgment **the court finds . . .** a defendant is incompetent” the court may stay the proceedings); RCW 10.77.084(2) (if at any time a professional person believes “competency has been, or is unlikely to be, restored, the defendant shall be returned to **court** for a hearing” for court to determine if restoration as occurred.) Thus, whether DSHS or any other agency has reached a new conclusion as to competency is not relevant to the question of who bears the burden of convincing the trial court that its prior determination of Mr. Coley’s legal status should be altered.

The opinion of the Court of Appeals properly applied the statutes and fully comports with the requirements of due process. As such the opinion does not present a constitutional issue at all. The State has not demonstrated any basis for granting review under RAP 13.4.

**2. If this Court grants review, the Court should review trial court’s refusal to address Mr. Coley’s request for self-representation.**

Because the Court of Appeals found the trial court erred in its determination of Mr. Coley’s competency the court did not reach Mr. Coley’s claim regarding the erroneous denial of his right to represent himself. The trial court’s ruling presents a substantial issue under Article I, section 22 and the Sixth Amendment and is plainly contrary to this Court’s decision in *State v. Madsen*, 168 Wn.2d 496, 503, 229

P.3d 714 (2010). Review of this claim is appropriate under RAP 13.4 if this Court grants the State's petition.

Article I, section 22 of the Washington Constitution explicitly guarantees a defendant the right to "appear and defend in person, or by counsel." *Madsen*, 168 Wn.2d at 503. The United States Supreme Court has recognized the Sixth Amendment implicitly provides a right to self-representation. *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

It is the defendant who suffers the consequences of a conviction, and,

It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. . . . his choice must be honored out of the respect for the individual which is the lifeblood of the law.

*Faretta*, 422 U.S. at 834 n.46 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1978)).

The trial court's discretion to grant a criminal defendant's request for self representation "lies at a continuum" based on the timeliness of the request:

- (a) if made well before the trial ... and unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law; (b) if made as the trial ... is about to commence, or shortly before, the existence of

the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (c) if made during the trial ... the right to proceed pro se rests largely in the informed discretion of the trial court.

*State v. Vermillion*, 112 Wn.App. 844, 855, 51 P.3d 188 (2002).

On April 20, 2009, Mr. Coley requested that he be permitted to waive his right to be represented by counsel and represent himself.

4/20/09 RP 1-2. The court briefly discussed the matter with Mr. Coley but the court determined its concerns for Mr. Coley's competency required the court to refer him for further evaluation at Eastern State Hospital. *Id.* at 4/29/09. The court did not resolve Mr. Coley's waiver of counsel.

Following a lengthy confinement at Eastern State Hospital, Mr. Coley was again before the court in November 2009, at which time he continued to voice his displeasure with his attorney. 11/9/09 RP 8.

After several lengthy delays, a competency hearing was finally held in June 2010. At that hearing, Mr. Coley again stated he wished to represent himself. 6/11/10 RP 140-42. Although the court had still not ruled on Mr. Coley's April 2009 motion to represent himself, and did not rule on the request then in front of it, the Court told Mr. Coley he

would need to renew the motion at a later date. 6/11/10 RP 143-44, 162.

Mr. Coley made his request to proceed pro se roughly 20 months prior to the commencement of trial.

There is no requirement that a request to proceed pro se be made at every opportunity. Further, a trial court's finding of equivocation may not be justified by referencing future events then unknown to the trial court. Such prophetic vision is impossible for the trial court.

*Madsen*, 168 Wn.2d at 507. Nonetheless, Mr. Coley made and renewed his motion several times. Yet the court never ruled on the motion. Indeed, the initial motion was followed by Mr. Coley's commitment for a competency evaluation. "Incompetency may be a legitimate basis to find a request for self-representation equivocal, involuntary, unknowing, or unintelligent. However, simply deferring ruling is incorrect as a matter of law." *Madsen*, 168 Wn.2d at 509

Despite the plain holding of *Madsen*, on appeal the State has responded that Mr. Coley's motion was not denied, but rather his "April 20, 2009, request was put in abeyance and then later abandoned." Brief of Respondent at 13. First, the State makes no effort to provide a legally significant distinction between holding the motion in "abeyance" and "deferring" ruling on it. Mr. Coley maintains there is

none, as by whatever term the court is not ruling on his motion as required. As *Madsen* makes clear the trial court's failure to address the motion "is incorrect as a matter of law." 168 Wn.2d at 509.

Second, Mr. Coley did not abandon his motion. The record makes clear that following his lengthy confinement at Eastern Mr. Coley renewed his request at subsequent hearings. 6/11/10 RP 140-42.

Mr. Coley timely, repeatedly and unequivocally requested to represent himself. The trial court never ruled on his requests. If this Court grants the State's petition it should grant review of the trial court's denial of Mr. Coley's motion to represent himself.

E. CONCLUSION

For the reasons above this Court should deny the State's petition for review. Alternatively, if this Court grants the State's petition it should grant review of the trial court's denial of Mr. Coley's motion to represent himself.

Respectfully submitted this 26<sup>th</sup> day of November, 2012.



GREGORY C. LINK – 25228  
Washington Appellate Project – 91072  
Attorneys for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,	)	
	)	
PETITIONER,	)	NO. 88111-1
	)	
v.	)	
	)	
BLAYNE COLEY	)	
	)	
RESPONDENT.	)	

---

**DECLARATION OF SERVICE**

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 26<sup>TH</sup> DAY OF NOVEMBER, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **ANSWER TO PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL:

- [X] Tyson Robert Hill  
Grant County Prosecutor's Office  
PO Box 37  
Ephrata WA 98823-0037
  
- [X] Blayne Coley  
345865  
Monroe Correctional Complex  
PO Box 777  
Monroe, WA 98272

**SIGNED** IN SEATTLE, WASHINGTON THIS 26<sup>TH</sup> DAY OF NOVEMBER, 2012

x *Ann Joyce*

## OFFICE RECEPTIONIST, CLERK

---

To: Maria Riley  
Subject: RE: Scanned image from MX-M753N

Received 11-26-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

-----Original Message-----

From: Maria Riley [mailto:maria@washapp.org]  
Sent: Monday, November 26, 2012 1:41 PM  
To: OFFICE RECEPTIONIST, CLERK  
Subject: FW: Scanned image from MX-M753N

State v. Blayne Coley  
Supreme Court No. 88111-1

Please accept the attached for filing in the above-referenced case.

Gregory C. Link  
Attorney for Respondent

-----Original Message-----

From: Administrator On Behalf Of administrator@  
Sent: Monday, November 26, 2012 1:37 PM  
To: Maria Riley  
Subject: Scanned image from MX-M753N

Reply to: [administrator@washapp.org](mailto:administrator@washapp.org) <[administrator@washapp.org](mailto:administrator@washapp.org)> Device Name: Not Set Device Model: MX-M753N Location: Not Set

File Format: PDF (Medium)  
Resolution: 200dpi x 200dpi

Attached file is scanned image in PDF format.  
Use Acrobat(R)Reader(R) or Adobe(R)Reader(R) of Adobe Systems Incorporated to view the document.  
Adobe(R)Reader(R) can be downloaded from the following URL:  
Adobe, the Adobe logo, Acrobat, the Adobe PDF logo, and Reader are registered trademarks or trademarks of Adobe Systems Incorporated in the United States and other countries.

<http://www.adobe.com/>