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Mar 24, 2015
Court of Appeals
Division I
State of Washington

No. 70320-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER ORTIZ-ABREGO,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Susan Craighead

REPLY BRIEF OF PETITIONER

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A. INTRODUCTION

Judge Susan Craighead previously determined Alexander Ortiz-Abrego was incompetent during his trial and vacated his conviction. Judge Craighead did so only after presiding over his trial, affording her the opportunity to observe his demeanor, and after considering expert opinions which validated her observations.

After lengthy restoration efforts, Mr. Ortiz-Abrego was returned to court to again determine whether he was competent. But rather than permit Judge Craighead, with her intimate familiarity with the case, to make that determination the State insisted instead on a jury trial.

Following that trial, at which the evidence largely mirrored that presented at the first hearing, and based on incorrect instructions regarding competency, the jury concluded Mr. Ortiz-Abrego was competent.

B. ARGUMENT

1. To be deemed competent a person must have the capacity to understand the proceedings as they occur.

Mr. Ortiz-Abrego does not argue for a “heightened” standard for determining competency. Instead, he addresses what the present standard requires – the “ability to make necessary decisions at trial.”

State v. Jones, 99 Wash. 2d 735, 746, 664 P.2d 1216, 1222 (1983). This standard equates to a requirement that the person have “the capacity for ‘reasoned choice’ among the alternatives available to him.” *Godinez v. Moran*, 509 U.S. 389, 397, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993). At bottom, what is demanded is that a defendant has “sufficient competence to take part in a criminal proceeding and to make the necessary decisions throughout its course.” *Moran*, 509 U.S. at 403 (Kennedy, J., concurring).

On appeal, as at trial, the State insists that actual ability to make those decisions when they need made is irrelevant to the determination of competency. As it did at trial, the State insists that this standard must remain abstract and divorced from the realities of trial as it unfolds. It is the State which seeks to diminish the standard to one that holds that if a person is competent at a moment in time it does not matter if all that follows shows he is not capable of making the decisions at the time they need made. For the reasons set forth in Mr. Ortiz-Abrego’s initial brief the State is wrong.

Competency means a person has the ability to understand the proceedings as they occur and the ability to assist counsel throughout. The jury was not permitted to make that determination here.

2. The trial court's jury instructions substantially misstate the standard for competency.

The trial court's instructions to the jury diluted the standard for competency to the point that the jury was required to find Mr. Ortiz-Abrego competent even where the jury determined Mr. Ortiz-Abrego lacked capacity to understand the proceedings or rationally assist counsel.

a. The trial court improperly permitted the jury to find Mr. Ortiz-Abrego competent even if it found he lacked the ability to understand the proceeding or rationally assist counsel.

The State attempts to recast Mr. Ortiz-Abrego's challenge to Instruction 8 as a challenge to the constitutionality of RCW 10.77.010(15). Brief of Respondent at 23. The State's contention begins and ends with the incorrect assumption that the statute and instruction mirror one another. They do not.

The court instructed the jury:

....

A defendant is incompetent when he lacks the capacity to understand the nature of the proceedings against him or assist in his own defense as a result of a mental disease or defect.

To prove that the defendant is competent, the State must establish either that the defendant has the capacity to understand the nature of the proceeding and the capacity to assist in his own defense, or that the lack of

these capacities is not the result of a mental disease or defect.

CP 271 (Instruction 8). The statute by contrast provides only

“‘Incompetency’ means a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect.” RCW 10.77.010(15). It is clear Instruction 8 goes well beyond the statutory language. This is not a challenge to the constitutionality of the statute but rather that instruction.

Instruction 8 permitted the jury to readily agree that Mr. Ortiz-Abrego’s mental condition deprived him of the ability to understand the proceedings and/or rationally assist counsel and yet still deem him competent. Indeed, the State made just such an argument to the jury.

b. The trial court failed to instruct the jury it must give great weight to defense counsel’s view of Mr. Ortiz-Abrego’s inability to rationally assist counsel.

The State contends “there was no error in jury evaluating the testimony of [former defense counsel] using the same criteria applied to any other witness.” Brief of Respondent at 34. That claim simply ignores well-established case law.

The role of counsel in a determination of competency of his client is unique. The lawyer is a representative of his

client and is also an officer of the court. The importance of the lawyer's role, as the one who has the closest contact with the defendant was recognized by the United States Supreme Court in *Drope*[, 420 U.S. at 177 n.13].

State v. Israel, 19 Wn. App. 773, 779, 577 P.2d 631 (1978). The Supreme Court explained:

Although we do not ... suggest that courts must accept without question a lawyer's representations concerning the competence of his client ... an expressed doubt in that regard by one with the closest contact with the defendant ... is unquestionably a factor which should be considered.

Drope v. Missouri, 420 U.S. 162, 177 n.13, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975). Counsel's opinion in this arena is undeniably different in kind than that of other witnesses.

The State next responds that properly instructing the jury on this standard would constitute a comment on the evidence. Brief of Respondent at 30. First, the State's insistence that a jury rather than a judge determine Mr. Ortiz-Abrego's competency cannot alter the framework by which that decision is made. The factfinder must afford great weight to the counsel's opinion regardless of who that factfinder is.

In addition, such an instruction could not be a comment on the evidence as it is a correct statement of the law. An instruction is not a comment on the evidence when supported by the evidence and is a

proper statement of law. *State v. Hughes*, 106 Wn.2d 176, 193, 721 P.2d 902 (1986). The need for the factfinder to afford deference to the opinions of defense with respect to a client's ability to assist in his own defense is a correct statement of the law. As such it could not be a comment on the evidence - no more so than an instruction on the presumption of innocence in a criminal case.

The jury was not provided meaningful information of counsels' opinions, was not instructed that those opinions should be afforded great weight, and was in fact told that the requirement itself was in any event a "minimal" one. The Court did not properly instruct the jury on the information it must consider in assessing Mr. Ortiz-Abrego's competence.

c. The trial court erroneously instructed jurors they must unanimously agree in order to find Mr. Ortiz-Abrego was incompetent.

Mr. Ortiz-Abrego contends the trial court improperly instructed the jury they must be unanimous to reach a decision. The State contends Article 1, section 21 requires a unanimous jury verdict. Brief of Respondent at 35. The State's argument presupposes Article I, section 21 applies to competency hearings. It does not. To conclude otherwise would invalidate thousands of prior competency

determinations made by judges rather than juries, and undoubtedly made without the benefit of a knowing intelligent and voluntary waiver of the right to a jury trial. As there is no right to a jury trial on the question of competency there can be no requirement of a unanimous jury.

Use of a jury to determine competency exists only as a matter of statute. RCW 10.77.086(3). But that statute does not require a unanimous jury to determine incompetency or for any verdict it might render. There is no legal requirement that the jury unanimously agree to return a verdict. Instruction 11 misstated the law.

3. The court violated Article I, section 7 and exceeded its authority under 10.77 RCW by requiring Mr. Ortiz-Abrego to submit to an evaluation conducted by the State's retained expert.

In his brief, Mr. Ortiz-Abrego contends nothing in RCW 10.77 authorizes the State to retain an expert to conduct an independent evaluation. The State does not dispute that contention. Indeed, at trial it conceded as much. 1/3/13 RP 43. Instead, the State now contends trial courts have inherent authority to do so. Brief of Respondent at 41. But that begs the question of why the specific procedures detailed in RCW 10.77 exist at all if courts have inherent authority in the realm of competency proceedings. Further, it ignores the Supreme Court's

holding that “procedures of the competency statute [chapter 10.77 RCW] are mandatory.” *State v. Heddrick*, 166 Wn.2d 898, 904, 215 P.3d 201 (2009) (citing *In re the Personal Restraint of Fleming*, 142 Wn.2d 858, 863, 16 P.3d 610 (2001)). The “failure to observe these procedures is a violation of due process.” *Id.*

The State dismisses as “meritless” the contention that a compelled psychological evaluation is an intrusion of one’s private affairs. Brief of Respondent at 42. By the deputy prosecutor’s logic any person could be compelled to undergo such an evaluation. Something is either a private affair or it is not. Article I, section 7, is not concerned with the reasonableness of the intrusion. Instead, the question is whether the search intrudes upon one’s private affairs. *State v. Snapp*, 174 Wn.2d 177, 194, 275 P.3d 289 (2012) (Article I, section does not turn on reasonable expectations of privacy but simply whether something is a private affair); *see also*, *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 305–06, 178 P.3d 995 (2008); *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009). A psychological evaluation unquestionably intrudes on one’s private affairs, thus it is permissible only if conducted with authority of law.

The State next makes the fantastic claim that recognizing the intrusion of privacy occasioned by a physiological evaluation will prevent trials of person claiming incompetence. Brief of Respondent at 43. Hyperbole aside, the authority of law requirement does not prohibit prosecutions. The fact that one's home is private does not prohibit all searches of the home nor preclude subsequent prosecution. Instead, it simply requires such searches be conducted with authority of law. So too, the recognition that a psychological evaluation intrudes on one's private affairs does not bar such evaluations, but rather requires they be conducted with authority of law. Assuming a lawful order under 10.77 RCW could be the authority of law required by Article 1, section 7, "authority of law" can certainly mean nothing more than what is permitted by 10.77 RCW.

It is clear CrR 4.7 is not independently the authority of law required by Article I, section 7. *State v. Garcia-Salgado* held that whatever CrR 4.7 permits, where it entails an intrusion of one's private affairs it must still satisfy the warrant requirement of Article I, section 7. 170 Wn.2d 176, 186, 240 P.3d 153 (2010). Indeed, while CrR 4.7(2) it specifically makes any order "subject to constitutional limitations." Thus, any such order must

. . . be entered by a neutral and detached magistrate, must describe the place to be searched and items to be seized, must be supported by probable cause based on oath or affirmation, and there must be a clear indication that the desired evidence will be found, the method of intrusion must be reasonable, and the intrusion must be performed in a reasonable manner.

Garcia-Salgado, 170 Wn.2d at 186. Plainly competency evaluations can and will occur, but they must be conducted with the authority of law. Brief of Respondent at 36-39.

As the State acknowledges, Mr. Ortiz-Abrego did object at the time the court ordered him to submit to the evaluation that is when the error occurred. RAP 2.5 does not require anything more and permits him to challenge the lawfulness of that order on appeal. *Garcia-Salgado* illustrates this point. There the defendant objected to the order requiring he submit a biological sample for DNA testing. 170 Wn.2d at 181-82. The defendant did not subsequently object when the evidence of the DNA match was offered at trial. *Id.* Just as there, the issue in this case is fully preserved.

4. Mr. Ortiz-Abrego's challenge to the unlawful competency evaluation is within the scope of review of the ultimate determination of competency.

As it did in its motion to strike the State confuses the notice of discretionary review with the order granting discretionary review and

the trial court's certification. RAP 2.4 is not concerned with the latter two only the former. Thus, a notice of discretionary review, just as a notice of appeal, need not specifically list which issue the party wishes to have review. In each instance review is order-specific not issue-specific. Once review is granted the scope of discretionary review is determined in the same fashion as an appeal of right. *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002).

Mr. Ortiz-Abrego's was not required to designate any issue at all. But, even Assuming RAP 2.4 is concerned with the order granting review as opposed to the notice; the State wrongly asserts this Court limited review to two issues. This Court's order granting review is silent on which issues may be raised. Thus, Mr. Ortiz-Abrego's challenge to the unconstitutional evaluation cannot be beyond the scope of the Court's order granting discretionary review.

Again, the rules governing which issues which may be raised are the same in a discretionary review as in an appeal of right. In a direct appeal of a criminal case, appeal of the judgment includes every ruling made prior to that judgement – suppression ruling, evidentiary objections, and sentencing errors. The elimination of the

need for piecemeal appeals was precisely the point of adopting RAP 2.4. Yet this is what the State insists upon. If Mr. Ortiz-Abrego loses his discretionary review, his case will face trial on the charges. If he is convicted he will be permitted to appeal. In that appeal, he will be permitted to raise precisely the same argument regarding the lawfulness of the compelled evaluation, because RAP 2.4 permits an appeal of a conviction to include all orders leading up to it. Because RAP 2.4 applies in the same manner to discretionary review as it does appeals – no more no less. *Right-Price Recreation*, 146 Wn.2d at 380. Thus, Mr. Ortiz-Abrego’s challenge to the unlawful competency evaluation is within the scope of review of the ultimate determination of competency.

C. CONCLUSION

Because Mr. Ortiz-Abrego's competency trial fell below the standards of due process, and because the compelled evaluation violated the provision of Article I, section 7, this Court should reverse the jury's finding of competency and remand for a proceeding which satisfies these constitutional commands.

Respectfully submitted this 24th day of March, 2015.



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DIVISION ONE**

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)	
ALEXANDER ORTIZ-ABREGO,)	
)	
Petitioner.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF MARCH, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF PETITIONER** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 24TH DAY OF MARCH, 2015.

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