

63906-4

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No. 63906-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Respondent,
v.
RUSSELL HOHF,
Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. THE TRIAL COURT'S ACKNOWLEDGEMENT THAT "SOME" EVIDENCE SUPPORTED THE FORCIBLE MEDICATION REQUEST CANNOT BE CONSTRUED AS AN IMPLICIT FINDING OF CLEAR, COGENT, AND CONVINCING EVIDENCE

The prosecution agrees, as it must, that the only standard of proof the trial court discussed in the context of its joined competency-forced medication hearing was the preponderance of the evidence standard. Response Brief at 10-11. It also rightly agrees that the required standard of proof evidence needed to order forced administration of antipsychotic drugs is clear, cogent and convincing evidence. See State v. Hernandez-Ramirez, 129 Wn.App. 504, 512, 119 P.3d 880 (2005) ("[t]he State bears the burden of proving each element justifying involuntary medication by clear, cogent, and convincing evidence."). But it urges this Court to surmise that the trial court applied the necessary standard of proof because, in its oral ruling, it said the word "clearly." Response Brief at 11.

First, the prosecution asks this Court to ignore the trial court's failure to weigh the evidence and apply the appropriate standard of proof by greatly misrepresenting the firmness of the

court's finding that Hohf required forced medication. The court found the threshold question of Hohf's incompetence to be a "close" question under the lesser preponderance standard that applied to the competency determination. 11/12/08RP 144, 153. Then, when deciding whether Hohf could be ordered to submit to involuntary medication, the court merely indicated there was "a showing" based on one disputed study of 22 patients in North Carolina, that medication would benefit delusional disorder. 11/12/08RP 155. Only one of the two experts diagnosed Hohf with delusional disorder. Dr. Muscatel did not believe there was sufficient evidence Hohf had a delusional disorder; and instead diagnosed Hohf with paranoid personality disorder, which was not treatable with medications. 11/12/08RP 89, 93-94. The medication would only potentially alleviate a delusional disorder; it would not treat a paranoid personality disorder. 11/12/08RP 98. Furthermore, paranoid personality disorder does not render a person incompetent to stand trial. 11/12/08RP 101.

Secondly, this Court should reject the State's efforts to equate the legal standard of "clear, cogent, and convincing evidence" with the routine preface of "clearly" used by people to press a point. The clear, cogent and convincing standard is legal

term of art, establishing a particularly stringent and more exacting standard of proof than a preponderance of the evidence. It is not the same thing as saying “clearly,” when discussing a case. The court never indicated it was applying any legal standard other than preponderance of the evidence, and its view of something as “clear” emanated from the lower threshold of proof it applied. See Burkey v. Baker, 6 Wn.App. 243, 244, 492 P.2d 563 (1971) (court reviewing findings “must be cognizant that evidence which is ‘substantial’ to support a preponderance test may not be sufficient to support the requirements for a test requiring clear, cogent and convincing evidence”).

The court’s failure to articulate and apply the correct standard of proof undermines its order mandating the forcible administration of psychotropic medications upon Hohf. The very significant intrusion into Hohf’s liberty cannot be permitted by a lesser standard of proof. Riggins v. Nevada, 504 U.S. 127, 137, 112 S.Ct. 810, 118 L.Ed.2d 479 (1992); Hernandez-Ramirez, 129 Wn.App. at 512.

2. THE PROSECUTION IGNORES THE IMPERMISSIBLE DICHOTOMY IN THE COURT'S DENIAL OF HOHF'S REQUEST FOR SELF-REPRESENTATION, WHERE THE COURT FOUND HOHF UNDERSTOOD THE PROCEEDINGS BUT WAS INCOMPETENT ONLY BECAUSE HE DID NOT GET ALONG WITH HIS ATTORNEYS

a. The court impermissibly denied Hohf his right to represent himself. Even in the context of a competency proceeding, an accused person has the right to represent himself. RCW 10.77.020(1). An accused person has the right to waive the assistance of counsel during "any and all stages" of competency proceedings. Id. This statutory right emanates from the explicit guarantee of the Washington Constitution as well as implicit interpretation of the Sixth Amendment. State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2009); U.S. Const. amend. 6; Wash. Const. art. I, § 22.

If a person seeks to waive counsel during competency proceedings, the court must evaluate the statutory criteria. The statute mandates that in assessing an accused person's waiver of counsel, the court "shall" consider whether the person understands:

- (a) The nature of the charges;
- (b) The statutory offense included within them;
- (c) The range of allowable punishments thereunder;

- (d) Possible defenses to the charges and circumstances in mitigation thereof; and
- (e) All other facts essential to a broad understanding of the whole matter.

RCW 10.77.020(1).

Here, Hohf met the requirements for self-representation under RCW 10.77.020(1). The court found Hohf understood the proceedings against him. CP 131 (“The defendant is capable of appreciating his peril and has a rational, as well as factual, understanding of the proceedings against him”). Even the State’s expert Dr. Gleyzer believed Hohf has “excellent command” of relevant legal terminology and issues. 11/12/08RP 57.

Consequently, the court unreasonably and erroneously refused to let him represent himself. He was not disruptive, not abusive, and not illogical in his thinking or behavior. He did not want to be represented by counsel and had every right to waive counsel. Hohf requested to represent himself and the court lacked discretion to deny this request when he understood the proceedings against him. See Madsen, 168 Wn.2d at 506-07.

b. The State greatly overstates Hohf’s willingness to have an attorney’s assistance. The State’s claim that Hohf actively sought and insisted upon an attorney after having a bad experience

with his original attorneys significantly misrepresents the facts of the case. Interestingly, the State does not even cite the record on this point, because the record would not support its claim.

The February 7, 2008, hearing on which the State relies was predicated on the prosecution's request that the court reconsider Hohf's pro se status, not Hohf's request. 2/7/08RP 6. The court questioned Hohf about the nature of the case, the sentence he faced, and his willingness to be represented by counsel. Hohf said he would agree to have an attorney but only if that attorney would follow Hohf's direction and goals. Id. at 10. He said he did not think he would benefit from a lawyer whose allegiance he did not trust and would prefer to represent himself. Id. at 12-14. He would only agree to have an attorney if it was someone with no affiliation or even association with the county prosecutors. After the court agreed to locate an attorney who met Hohf's qualifications, Hohf agreed to "give it a shot" but he insisted he would have to defend himself if the lawyer did not communicate with him. Id. at 15. The court directed Hohf to meet with the county office of public defense and promised to contact the office to explain Hohf's precise attorney needs.

Hohf made clear his willingness to be represented hinged on his perception that the lawyer was someone he could work with and otherwise, he would prefer to represent himself. 2/7/08RP 10, 12-14. An unequivocal request for self-representation is not eroded by when it includes an alternative willingness to try a new counsel. Madsen, 168 Wn.2d at 507.

Moreover, Hohf's willingness to try another lawyer did not last long. Although Hohf agreed to "give it a shot" with a court-appointed lawyer, Hohf decided this newly appointed lawyer would not serve his interests and goals. At the next hearing one week later, Hohf said, "I'm still pro se," and he considered the appointed attorney an assistant. 2/14/08RP 2. The attorney agreed that what Hohf "really wants" is to represent himself. Id. at 2-3. The court refused to consider the matter "today." Id. at 3.

Hohf requested to represent himself many times. See 1/17/08RP 8; 1/24/08RP 3; 2/12/08RP 2; 10/14/08RP 10-11; see also CP 172 (Hohf's letter to court, saying, "I have the constitutional right to represent myself; which I am doing."); CP 175 (Motion Showing Defendant Acting Pro Se). Hohf unequivocally requested to represent himself, and only stopped making these requests after the court insisted that he would not be competent to stand trial

unless he cooperated with his lawyers. Hohf was entitled to represent himself under the guidelines set forth in RCW 10.77.020(1) as well as the state and federal constitution. The court's refusal to accommodate this request, and instead treat it as evidence of incompetence, denied Hohf his basic right to waive counsel.

c. The court's competency determination rested on the impermissible circumstance of Hohf's desire to represent himself. The trial court engaged in the completely circular reasoning that Hohf could not represent himself because he was incompetent to stand trial and he was not be competent to stand trial because he wanted to represent himself. The State ignores this conundrum. Hohf was not "psychotic," as in State v. Hahn, 106 Wn.2d 885, 891, 726 P.2d 35 (1980). He understood the charges against him and the nature of the proceedings in a rational fashion. CP 131. The trial court's insistence that it could not consider his request for self-representation until it resolved his competency to stand trial, coupled with its finding that Hohf was incompetent solely because he did not trust his attorneys and wished to represent himself, subverted his right to self-representation under the state and federal constitutions, as well as by statute. Because

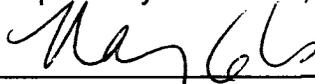
Hohf was entitled to represent himself based on his unequivocal requests, he is entitled to a new trial. Madsen, 168 Wn.2d at 509.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Hohf respectfully requests this Court remand his case for further proceedings.

DATED this 11th day of August 2010.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

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)	
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)	
RUSSELL HOHF,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF AUGUST, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** 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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