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NO. 64697-4-1

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

REC'D
FEB 23 2011
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Appellant,

v.

CHARLES DELAURO,

Respondent.

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CE

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

The Honorable Brian Gain, Judge

BRIEF OF RESPONDENT

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A. ISSUE IN RESPONSE

Did the trial court properly deny the state's motion to file a statutorily-protected Western State Hospital (WSH) competency report where the defense request for a competency determination was withdrawn, and where no rule, statute, case, or constitutional provision required the report to be filed?

B. COUNTERSTATEMENT OF THE CASE

1. Charge, Plea, and Sentence

The state's brief sets forth facts in two cases involving respondents Charles DeLauro and Rodrigo Hernandez. This brief is filed solely on behalf of DeLauro and is thus limited to that case.¹

The publicly available criminal court file shows the following facts. On February 11, 2009, the state charged DeLauro with second degree malicious placement of an imitation explosive device. CP 1. The certification for probable cause surmises DeLauro may have hoped to be killed by a police officer, CP 2-6, while other facts suggest he hoped to get help for his mental condition. CP 5-7. The certification noted DeLauro had previously engaged in "acts of this

¹ At the time this brief was filed, no appellate counsel had appeared or been appointed for Hernandez. Our firm is not counsel for Hernandez.

nature.” His case manager at “Seattle Mental Health” suggested the case should be handled in the criminal system, rather than the mental health system. CP 5.

At a public hearing on May 8, 2009, the court granted a defense motion for a competency evaluation. CP 9. The court entered a preprinted form order, on the state’s pleading paper, directing WSH to conduct an inpatient competency evaluation. CP 11-12. The court directed WSH “to file the report with the undersigned court” and provide copies to the prosecutor, defense counsel, “and others as designated in RCW 10.77.060 and 10.77.065.” CP 12 (emphasis added). The court directed the report to include required elements set forth in RCW 10.77.060, including a diagnosis of the mental condition and an opinion on the defendant’s capacity to understand the proceedings and assist in his defense. The next hearing was set for May 28, 2009. CP 12-13. The order was signed by Judge Brian Gain. CP 13.

The competency hearing was continued several times. The state has not provided a record of the hearings where the continuances were entered, although nothing suggests those hearings were closed to the public. Supp. CP __ (sub nos. 21, 22, 22A, 23).

The competency hearing occurred June 24, 2009. CP 14. At that public hearing the court considered a WSH forensic evaluation report dated June 23, 2009. CP 17-24. The report shows DeLauro was taken to WSH on June 2, 2009 for various evaluations. CP 18. The report concludes DeLauro suffers from a mood disorder and was not able to rationally assist in his defense at that time. CP 19-22. Copies of the report were provided, as ordered, to the Chief Judge, the deputy prosecutor, defense counsel, the King County designated mental health professional, and the doctor at the King County Jail. CP 24.²

The court entered a finding that DeLauro was presently incompetent to stand trial. There is no indication the finding was contested.³ The court then stayed the criminal proceedings and ordered a 90-day commitment to restore competency. The court directed a new report to be prepared at the end of that 90-day period. That report, the court ordered, was to "be furnished to this court,

² The first lines of the report state: "The forensic evaluation reflected in this report was conducted pursuant to court order under the authority of RCW 10.77.060. This report was released only to the court, its officers and to others designated in statute and is intended for their use only. Any other use or distribution of this document is not authorized by the undersigned." CP 17.

³ The state has not provided a transcript from that hearing.

counsel for both parties, and the King County Jail Psychiatric Unit professional staff[.]” CP 15.

The hearing set for September 30 was continued to October 15, 2009. CP 26-28. At that hearing, defense counsel withdrew the request for a competency determination and stipulated DeLauro was competent. CP 93. The state nonetheless presented findings of fact and conclusions of law regarding competency. CP 29-30. The findings note that the prosecutor, defense counsel, and defendant “all speaking in support of a determination of competency; the court having questioned the defendant and defense counsel, and having read and considered the” WSH report dated September 22, 2009, the court found DeLauro competent to stand trial and enter a plea. CP 29-30. Nothing suggests the courtroom was closed for that hearing.

On November 20, 2009, the court granted the state’s motion to amend the charge to attempted threats to bomb or injure property. CP 90-92. DeLauro pled guilty, and was credited for time served in custody. CP 66-89. As part of the plea agreement, the state agreed to recommend a mental health evaluation and require DeLauro to follow recommended treatment. CP 89.

On December 7, 2010, the court entered a standard range sentence of 12 months in jail with credit for time served. CP 101.

The court also ordered 12 months of community custody, a condition of which was a mental health evaluation and participation in recommended treatment. CP 101, 105.

2. Argument and Ruling on Motion to File WSH Report.

At a hearing on November 20, 2009, before sentencing, the court considered the state's motion to require the formal filing of the second WSH report. RP 1-23.⁴ The state argued the court was required to file the report for a variety of reasons. The state's claims, inter alia, depended on the following assumptions: (1) the report was a "court record" under GR 31(c) and GR 15 (CP 31-32, 38-39); (2) the report would be a necessary part of an appellate record if DeLauro were to seek review of the competency finding (CP 32-33); (3) the report was necessary to serve the public's "right" to open proceedings (CP 32-33, 35-39, 46-52); and (4) DeLauro's right to a fair trial would not be jeopardized by conducting the competency proceedings in open court. CP 40-42. From those assumptions, the state then claimed (1) DeLauro had not complied with GR 15 and (2) the

⁴ At the time this brief was filed, the only report of proceedings was from the November 20, 2009 hearing.

Ishikawa⁵ factors did not weigh in favor of “closing the courtroom” or “sealing competency reports.” CP 42-55.⁶

In response, defense counsel noted that the motion to determine competency was withdrawn at the October 15 hearing. Counsel explained, “[a]fter the 90 days defense withdrew its motion and stipulated that the defendant was in fact competent.” CP 93. Counsel maintained the relevant statute did not require the filing and service of the report. CP 94 (citing RCW 10.77.065(1)(a)(i)). Counsel also cited State v. Heddrick, 166 Wn.2d 898, 215 P.3d 201 (2009), where a motion to determine competency was later withdrawn. As the Heddrick court held, a person may waive competency procedures when counsel withdraws the challenge to competency. CP 96 (citing Heddrick, 166 Wn.2d at 907-08).

The court heard argument on November 20, 2009. RP 2-23. At the hearing, the state conceded DeLauro had a privacy interest in his medical records. RP 11-12. The state nonetheless claimed that DeLauro’s due process rights required the filing of the report. RP 2-3.

⁵ Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982).

⁶ The state also asserted that DeLauro’s “due process rights required the report to be filed” (CP 33-35), and that the victim and the public had not been given an opportunity to object to the “closure.” CP 52-53. Those arguments have been abandoned in this Court.

The court was very concerned with the practical effect of the state's position.

I am struck by the anomaly of indicating that to protect the defendant's due process rights, he necessarily, he or she, gives up the right to privacy under state statute and other case law and authority. I think that is not what was intended. I think the disclosure provisions of the state statute on competency evaluations to me clearly indicate that the reports are to be provided to the interested parties for the limited purpose of determining whether this person is competent to stand trial, therefore protecting the due process rights. And I am satisfied that the legislature could have said we are hereby abrogating the right to privacy in terms of medical and psychiatric records if that is what they intended. . . .

I am satisfied at this point that the due process rights do not give up all of the defendant's privacy rights.

RP 19-20. The court declared, "The due process safeguards of the statute do not open up a particular defendant's entire history to public scrutiny." RP 21. The court recognized a different issue might arise if the competency question was contested, because in that circumstance the court must make a record as to what it considered in reaching a decision. RP 20-22.

On December 9, 2011, the court entered an order denying the state's request to file the WSH report. CP 106. This Court then granted the state's motion for discretionary review.

C. ARGUMENT

1. THE TRIAL COURT'S ORDER IS CONSISTENT WITH RELEVANT RULES AND STATUTES.

The state claims the trial court erred in denying the state's motion to file the second WSH report. The narrow issue on appeal is whether any law required the trial court to "file" the report and thereby make it a "court record." Where the defense request for a competency determination was withdrawn and where competency was stipulated, there was no controversy before the court. Given this, there was no obligation to file the report. The trial court should be affirmed.

"Courts have inherent authority to control their records and proceedings." Yakima v. Yakima Herald-Republic, ___ Wn.2d ___, ___ P.3d ___, 2011 WL 113764 (No. 82229-8, 1/13/11) (citing Nast v. Michels, 107 Wn.2d 300, 305, 730 P.2d 54 (1986); Cowles Publishing Co. v. Murphy, 96 Wn.2d 584, 588, 637 P.2d 966 (1981)). There is no history of public access to WSH competency reports. The statutory scheme instead permits only limited access. See section 1b, infra.

Documents that have been "filed" with a court generally become "court records." Seattle Times Co. v. Serko, ___ Wn.2d ___,

243 P.3d 919, 928-29 (2010) (exhibits marked and admitted in trial of co-defendant were “court records” subject to article 1, § 10); State v. Mendez, 157 Wn. App. 565, 580-82 & n.11, 238 P.3d 517 (2010) (defense counsel’s billing documents filed with the court were court records; Mendez himself filed the documents and moved to seal them, thereby conceding their status as “court records”). Filed documents are generally subject to article 1, § 10 when the court relies on them to resolve a controverted issue. Rufer v. Abbott Labs., 154 Wn.2d 530, 114 P.3d 1182 (2005); Dreiling v. Jain, 151 Wn.2d 900, 910, 93 P.3d 861 (2004).

The state’s claim raises a different issue – whether a WSH report generated for a withdrawn competency determination must be “filed” and therefore become a “court record.” The answer is no for two reasons: (1) protected psychological evaluations are not “court records” and (2) DeLauro’s competency was not in controversy at the October 15 hearing, because both parties agreed he was competent. CP 29-30, 93.

The state initially claims, “WSH reports considered as part of a competency hearing” should be filed with the superior court clerk. BOA at 6. The state next asserts the “open justice” provisions of the state constitution require the filing of “documents relied upon when a

judge is making a decision.” BOA at 6. What the state ignores is that the second WSH report was not “considered as part of a competency hearing” and the judge did not make a decision. Instead, DeLauro withdrew his request for a competency determination and the parties stipulated to competency. CP 29-30, 93.

To show the trial court abused its discretion in denying the motion, the state must cite some rule, statute, case, or constitutional provision requiring a WSH report be “filed” as a “court record.” Because the state has not done that, it has not met its burden.

a. No Court Rule Required the Filing of the WSH Report.

The state cites several cases for the proposition that “court records” are presumptively open. This may be true, but the case authority does not define a “court record.” The analysis must first start there.

Three rules cited by the state discuss “court records” and public access thereto: GR 31(a), GR 31(c)(4), and CR 5(d)(1). None answers the question posed.

GR 31(a) is designed to “facilitate access to court records.” It sheds no light, however, on whether a WSH competency report is a

“court record.” The rule defines “court record” as those things that are kept by a court:

“Court record” includes, but is not limited to: (i) Any document, information, exhibit, or other thing that is maintained by a court in connection with a judicial proceeding, and (ii) Any index, calendar, docket, register of actions, official record of the proceedings, order, decree, judgment, minute, and any information in a case management system created or prepared by the court that is related to a judicial proceeding. Court record does not include data maintained by or for a judge pertaining to a particular case or party, such as personal notes and communications, memoranda, drafts, or other working papers; or information gathered, maintained, or stored by a government agency or other entity to which the court has access but which is not entered into the record.

GR 31(c)(4). But this section provides no insight on whether a WSH competency report must be “filed” or “maintained” by the court.

The next cited rule requires the “filing” of “pleadings and other papers after the complaint required to be served upon a party.” CR 5(d)(1) (emphasis added). But no statute, rule, or case requires a WSH competency report to be “served” on a party. “Service” is a legal term of art. It is defined as “[t]he formal delivery of a writ, summons, or other legal process” or “[t]he formal delivery of some other legal notice, such as a pleading.” Black’s Law Dictionary 1372

(7th Ed. 1999). The rule lists numerous documents required to be served, none of which resemble WSH competency reports. CR 5(a).⁷

The last rule cited by the state, GR 15, addresses when it is appropriate to seal or redact court records that are already filed. It does not address whether documents must be filed in the first instance.

b. No Statute Required the Filing of the WSH Report.

The relevant statutes indicate formal filing of competency reports is not anticipated or required when competency is stipulated, or when the request for a competency determination is withdrawn.

Washington's statutory competency procedure does not require formal "filing" or "service" of a report, nor does WSH provide "proof of service." The relevant statute instead directs the facility conducting the evaluation to

⁷ In relevant part, CR 5(a) provides: "Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties."

provide its report and recommendation to the court in which the criminal proceeding is pending. A copy of the report and recommendation shall be provided to the designated mental health professional, the prosecuting attorney, the defense attorney, and the professional person at the local correctional facility where the defendant is being held, or if there is no professional person, to the person designated under (a)(ii) of this subsection.

RCW 10.77.065(1)(a)(i) (emphasis added). The statute does not require service or filing.

Other provisions show the opposite is true. With an exception not applicable here,⁸ the statute protects privacy, limiting access to listed persons and entities:

all records and reports made pursuant to this chapter, shall be made available only upon request, to the committed person, to his or her attorney, to his or her personal physician, to the supervising community corrections officer, to the prosecuting attorney, to the court, to the protection and advocacy agency, or other expert or professional persons who, upon proper showing, demonstrates a need for access to such records. All records and reports made pursuant to this chapter shall also be made available, upon request, to the department of corrections or the indeterminate sentence review board if the person was on parole, probation, or community supervision at the time of detention, hospitalization, or commitment or the person is subsequently convicted for the crime for which he or she was detained, hospitalized, or committed pursuant to this chapter.

⁸ The exception applies only to sex offenders and violent offenders.

RCW 10.77.210(1) (emphasis added).⁹ By listing the persons and entities entitled to access, the Legislature specifically excluded public viewing. State v. Delgado, 148 Wn.2d 723, 729, 63 P.3d 792 (2003) (discussing the rule of construction known as “expressio unius est exclusio alterius”).¹⁰

The court ordered that the report be prepared and “furnished to this Court, counsel for both parties, and the King County Jail Psychiatric Unit[.]” CP 15 (emphasis added). In practice, it appears WSH report authors know their statutory duty and recognize no obligation to “file” the report and “serve” copies on persons entitled to them under the statute. CP 17.¹¹

⁹ DeLauro twice cited RCW 10.77.210 in his answer to the state’s motion for discretionary review. Answer, at 2 n.1, at 8. The state ignores RCW 10.77.210(1).

¹⁰ Other statutes prevent the dissemination of the type of private health care information that can be routinely included in WSH reports. See, e.g., Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C.A. § 1320d-1 et seq.; Pub.L. No. 104-191, 110 Stat. 1936; In re the Matter of C.B., 865 N.E.2d 1068, 1072 (Ind. App. 2007) (“HIPAA protects individuals from unwarranted dissemination of medical and mental health records by restricting access to such records without the individual’s direct consent.”); Public Health Service Act (PHSA) U.S.C.A. §§ 290dd-2; RCW 70.96A.150; State v. Wheat, 118 Wn. App. 435, 441, 76 P.3d 280 (2003) (drug and alcohol treatment records are private; specific consent is required for access).

¹¹ This case involves two evaluation periods. The report dated June 23, 2009, submitted after the first 15-day period, began with this

Had the Legislature intended to require "service" or "filing," it could have so specified. The Legislature is familiar with both terms; many statutes require listed documents to be "served,"¹² and "filed."¹³ The use of different language in RCW 10.77 indicates a different intent. State v. Jackson, 137 Wn.2d 712, 724, 976 P.2d 1229 (1999) ("[I]t is an 'elementary rule that where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent'" (quoting United Parcel Serv., Inc. v. Dep't of Revenue, 102 Wn.2d 355, 362, 687 P.2d 186 (1984))).

notice: "The forensic evaluation reflected in this report was conducted pursuant to court order under the authority of RCW 10.77.060. This report was released only to the court, its officers and to others designated in statute and is intended for their use only. Any other use or distribution of this document is not authorized by the undersigned." CP 17. Copies were provided to the authorized persons noted by "cc:" at the end of the report, not by "proof of service." CP 24. The report drafted after the 90-day restoration period was not filed.

¹² See, e.g., RCW 4.28.080 (commencing civil action); RCW 6.26.060(4) (garnishment); RCW 10.14.080 (anti-harassment orders).

¹³ See e.g., RCW 4.48.110(3) (establishing when a "report" shall be "filed" with the court); RCW 7.52.370 (same); RCW 9.73.210(3) (requiring law enforcement to file reports with the administrator for the courts); RCW 10.73.090, .140 (limiting time and circumstances in which a collateral attack may be "filed"); RCW 13.34.120(2) (allowing reports to be filed with the court).

The conclusion is particularly strong given other language in RCW 10.77.060, allowing the defense to hire its own expert and “file” its own report.¹⁴ RCW 10.77.060(2). The Legislature’s use of different terms within the same statute shows a different intent. State v. Costich, 152 Wn.2d 463, 475-76, 98 P.3d 795 (2004).¹⁵

The state has cited no other statutes. DeLauro’s counsel has found no statute that would require the WSH report to be filed as a court record. The trial court did not err in denying the state’s motion to file the report.

2. THE TRIAL COURT’S ORDER IS CONSISTENT WITH RELEVANT CASE LAW AND CONSTITUTIONAL REQUIREMENTS.

As shown above, no statute or court rule required the court to file the report. The only remaining question is whether filing is required by the constitution or case law. The answer is no.

¹⁴ The need for a separate defense report would arise where the state’s report is contested and a court would need to resolve the dispute. That different factual scenario is discussed in section 2, infra, and shows why “filing” the second report may be appropriate.

¹⁵ The former version of RCW 10.77.060 noted the defense could “join in the report filed by the court appointed experts” or file its own report. Laws of 1974, Ex. Sess., ch. 198, § 6 (emphasis added). That language was removed from the statute in 1974. Nothing in the current statutes suggests the Legislature intends the state’s competency report to be filed.

a. Dicta in State v. Heddrick is not Binding or Persuasive.

The state cites State v. Heddrick for the proposition that “[a] court must enter ‘any WSH report into evidence as would be required under RCW 10.77.065(1)(a)(i),’ and failure to observe such statutory procedures can be a due process violation.” BOA at 11 (underscore added, internally quoting Heddrick, 166 Wn.2d at 204).

There are several problems with the state’s reliance on Heddrick. First, the constitutional “due process” issue had nothing to do with filing the WSH report. The “due process” question was whether Heddrick was substantively competent. The Supreme Court determined there was no substantive question because the defense presented no evidence to meet its burden to show Heddrick was not competent. Heddrick, 166 Wn.2d at 204-08.

Heddrick was found incompetent and sent to Western State Hospital (WSH) for 90 days to restore his competency. The court directed WSH to prepare a report. Defense counsel also retained an expert to prepare an additional report. When that second expert informed counsel of his opinion that Heddrick was competent, counsel declined to waste additional money by asking the expert to prepare a report. The WSH report was prepared and its author concluded

Heddrick was competent. Neither report was “filed.” Because there was no evidentiary dispute, Heddrick’s counsel withdrew the competency motion. Heddrick, 166 Wn.2d at 203-04.

Heddrick was convicted and appealed, arguing he was denied due process when the trial court did not expressly follow the statutory competency procedures of RCW 10.77.060 by holding an evidentiary hearing to determine competency. Heddrick, at 204-07. The Supreme Court rejected the claim, finding Heddrick had waived the issue by withdrawing the motion. Heddrick, at 206.

In DeLauro’s case, the state initially cites loose dicta in Heddrick to claim the trial court should “enter ‘any WSH report into evidence as would be required under RCW 10.77.065(1)(a)(i).” BOA at 11 (quoting Heddrick, at 204). But the statute does not require entering the report into evidence; it instead requires the facility conducting the evaluation to “provide its report and recommendation to the court in which the criminal proceeding is pending.” RCW 10.77.065(1)(a)(i) (emphasis added).

Heddrick also shows the state has no legitimate fear of future reversal. As the court recognized, a competency motion may be withdrawn. Although an incompetent person cannot waive the substantive requirement that he not be tried while incompetent, the

person can waive statutory procedures. By withdrawing the competency motion, Heddrick's counsel did exactly that. Heddrick, at 906-08. So did DeLauro's counsel. CP 29-30, 93; RP 8. Although the trial court may have "authority to order and complete competency proceedings on its own motion, a court must do so only when there is reason to doubt a defendant's competency." Heddrick, at 206. Nothing suggests the trial court's inquiry in DeLauro's case was anything less than thorough.¹⁶

The state theorizes that a person who waives statutory procedures may nonetheless appeal later. BOA at 12. The first answer is "that is not this case," because DeLauro did not appeal. The second answer is "so what." As did the Heddrick court, any appellate could correctly find the issue waived and any error invited. Heddrick, at 206-07.¹⁷

The state also maintains there is no distinction between contested and non-contested competency hearings. BOA at 12. This claim ignores the fundamental rule that there must be a dispute

¹⁶ The court questioned DeLauro and defense counsel. CP 29. The state has not provided the transcript from the October 15 hearing.

¹⁷ Any potential future collateral attack would fare even worse under the stricter review standards for personal restraint petitions. There are no bursting "floodgates" here.

before a court must make a decision. Until a court must make a *decision* to resolve a controversy, there is no public right to access the “court records” necessary to support the *decision*.

b. Article 1, § 10, Does not Require a WSH Report Be Filed Where the Statutory Request to Determine Competency is Withdrawn.

The last remaining question is whether the state constitution required the report to be filed. Again, the answer is no.

The Washington Constitution provides that “[j]ustice in all cases shall be administered openly” Const. art. 1, § 10. As the state concedes, this requirement does not mean that everything a court considers must be made public. The state properly recognizes the public’s right to access documents is limited to “documents relied upon when a judge is making a decision.” BOA at 6. For there to be a “decision,” there must be a “controversy” or a dispute for the court to decide. Courts are not authorized to give advisory opinions. See Walker v. Munro, 124 Wn.2d 402, 414, 879 P.2d 920 (1994) (Washington courts do not issue advisory opinions).

The question posed here is when is “justice” being “administered”? Two cases cited by the state address what is and is not a “court record,” and show that a court must be called upon to

decide a controversy before a document like this one must be filed as a “court record.”

In Buehler v. Small, 115 Wn. App. 914, 64 P.3d 78 (2003), the court made it clear that all of a judge’s files are not open to the public under article 1, § 10. Buehler was a criminal defense attorney who regularly appeared before Judge Small. Buehler noticed that Judge Small kept notes about criminal cases in his computer and referenced those notes on the bench when sentencing defendants. Judge Small’s notes contained names, dates, standard ranges, and sentences for cases since 1995. The judge said he referenced the files to determine whether a plea agreement or sentence was fair and consistent. Buehler, 115 Wn. App. at 916-17. Buehler asked for the notes, but Judge Small denied the request.

Buehler then filed suit, arguing the notes should be made available under the public disclosure act, the constitution, and the common law. The trial court and Court of Appeals rejected Buehler’s claims. Buehler, at 918-21.

The appellate court noted article 1, § 10 requires disclosure “whenever particular documents or records are instrumental in the process of determining guilt or innocence or judicial resolution of a civil controversy.” Buehler, at 920 (citing Seattle Times Co. v.

Eberharter, 105 Wn.2d 144, 155, 713 P.2d 710 (1986)). The court held article 1, § 10 did not apply because “Judge Small's personal computer files, although work related, are not part of any case record and do not constitute transcripts of criminal proceedings or exhibits.” Buehler, at 921.

Similarly, in Eberharter, the Supreme Court held the public had no right to access a search warrant affidavit in an unfiled criminal case. The court reasoned that public scrutiny would take place if and when a charge was filed.¹⁸ If no charge was justified, the target of the warrant could file a civil suit seeking redress for an unlawful invasion. At that point the documents could become court records in a disputed case. The court held protecting privacy – in that case the privacy of informants – was a valid reason to delay public access. Eberharter, 105 Wn.2d at 152-53.

“Article 1, section 10 provides for a right of access to (1) trials, (2) pretrial hearings, (3) transcripts of pretrial hearings or trials, and (4) exhibits introduced at pretrial hearings or trials.” Eberharter, 105 Wn.2d at 155. It does not provide access to a search warrant affidavit until there is a judicial dispute – i.e. until charges are filed. Id., at 156;

¹⁸ The investigation at issue in Eberharter – involving the “Green River Murders” – was no small matter of public interest.

see also, Cowles Pub. Co. v. Murphy, 96 Wn.2d 584, 590, 637 P.2d 966 (1981) (setting forth procedures for filing and not filing search warrant records); Cohen v. Everett City Council, 85 Wn.2d 385, 389, 535 P.2d 801 (1975) (“Once the court reached the merits of the controversy, the testimony-transcript-had to be part of the public record”).¹⁹

Applied here, Buehler and Eberharter show the trial court did not violate article 1, § 10 in DeLauro's case. An accused is presumed competent and the defense bears the burden to establish incompetency. See State v. Harris, 114 Wn.2d 419, 432, 789 P.2d 60 (1990). While DeLauro's competency was initially questioned, there is no dispute his competency was restored.²⁰ At that point DeLauro's counsel withdrew the challenge, thereby obviating any need for a hearing. Heddrick, at 206-08. There was no longer a controversy for the court to decide. Buehler, at 920.

¹⁹ Mills v. Western Washington University, ___ Wn.2d ___, ___ P.3d ___, 2011 WL 324068, *5 (No. 83597-7, 2/3/11) (“justice” is “administered” when court reviews a disputed agency action, citing Cohen).

²⁰ The state stipulated to competency in the trial court and does not dispute the merits of the trial court's competency determination in this Court.

Furthermore, the public has full access to the other “court records” in the file showing how the competency issue was initially raised then resolved. The courtroom was not closed when the court considered the competency issue. The existing file makes it plain that no one contested DeLauro’s competency and the court had no reason to doubt competency after conducting its own questioning.

The remaining cases cited by the state also accept the controversy requirement as a key trigger for article 1, § 10 protections. In Dreiling v. Jain, 151 Wn.2d 900, 910, 93 P.3d 861 (2004), the court explained the difference between documents attached to summary judgment motions and “mere discovery.” The former are “court records” because “[s]ummary judgment effectively adjudicates the substantive rights of the parties.” The disclosure of “mere discovery” that is not part of the court’s decision-making process, in contrast, is not governed by article 1, § 10. Dreiling, 151 Wn.2d at 909-10.

Rufer v. Abbott Labs leads to the same conclusion. After trial, one of the defendants moved to seal a trial exhibit and several pretrial and deposition exhibits that had already been “filed”. Rufer, 154 Wn.2d 530, 540 & n.3, 114 P.3d 1182 (2005). Our Supreme Court held the Ishikawa factors must be considered before sealing the documents. Rufer, at 546-49. The court did not address what

documents must be “filed;” it merely reaffirmed that a “filed” document becomes a “court record,” and motions to seal it require adherence to Ishikawa. Rufer, at 549. The court also reaffirmed “that article I, section 10 is not relevant to documents that do not become part of the court’s decision making process.” Rufer, at 548 (citing Dreiling, 151 Wn.2d at 909-10).

In State v. Mendez, a newspaper sought access to defense counsel’s filed and sealed billing records. 157 Wn. App. 565, 580-82, 238 P.3d 517 (2010).²¹ Counsel had filed the records and ex parte motions to seal them. On appeal, the court assumed the records were “court records”; Mendez himself filed the documents and thereby conceded their status as court records. Mendez, at 582 & n.11 (“Mendez apparently believed the billing documents were ‘court records’ or he would not have sought to seal them in the first place. If they were ‘court records’ for sealing purposes, they must also be ‘court records’ for purposes of unsealing.”) The court distinguished Dreiling and Rufer, reasoning that the filed and sealed “court records” in Mendez’ case were subject to GR 15 standards when determining if the records should be unsealed. In that narrow circumstance, article

²¹ The state’s opening brief does not cite Mendez, but its reply might.

1, § 10 applied even though the trial court had not used the records to make a decision resolving a dispute. Mendez, 157 Wn. App. at 582.

Dreiling and Rufer support the trial court's conclusion in DeLauro's case that a controversy is necessary to trigger article 1, § 10 with respect to protected and not-yet-filed WSH reports. These cases show the trial court correctly reasoned a different result might obtain in cases where competency remains disputed - i.e. where the controversy remains. RP 20-21. Mendez merely assumes the billing documents were "court records" because counsel filed and moved to seal them. Mendez does not hold that article 1, § 10 applies to documents not yet filed, not required to be filed, and not used to resolve a controversy.

The other cases the state cited do not address when a WSH report must be "filed" and when it thus becomes a "court record." The cases instead answer a different question – when an existing "court record" may be "sealed" or "closed." For this reason, none are on point. See, Allied Daily Newspapers of Washington v. Eikenberry, 121 Wn.2d 205, 848 P.2d 1258 (1993) (invalidating statute which precluded dissemination of filed court records containing names of child sexual assault victims); Indigo Real Estate Services v. Rousey, 151 Wn. App. 941, 215 P.3d 977 (2009) (motion to redact name from

SCOMIS and filed court records must satisfy Ishikawa factors); State v. Waldon, 148 Wn. App. 952, 202 P.3d 325 (2009) (motion to seal a vacated record of conviction must comply with Ishikawa); In re Marriage of R.E., 144 Wn. App. 393, 399-405, 183 P.3d 339 (2008) (documents already filed are court records; a party opposing a motion to unseal court records must satisfy the Ishikawa factors); In re Detention of D.F.F., 144 Wn. App. 214, 183 P.2d 302, rev. granted, 164 Wn.2d 1034 (2008) (invalidating as unconstitutional MPR 1.3, with its presumption of closed proceedings); Woo v. Fireman's Fund Ins. Co., 137 Wn. App. 480, 154 P.3d 236 (2007) (previously filed exhibits could not be sealed without satisfying Ishikawa).

When DeLauro's counsel withdrew the request for a competency determination, there was no longer a controversy for the trial court to decide. The court therefore had no obligation to file the WSH report. The court did not abuse its discretion in denying the state's motion when it recognized and protected DeLauro's undisputed privacy rights in the WSH report.

D. CONCLUSION

The trial court's order should be affirmed.

DATED this 23rd day of February, 2011.

Respectfully Submitted,

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OID No. 91051

Attorneys for Respondent

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

STATE OF WASHINGTON)	
)	
Appellant,)	
)	
vs.)	COA NO. 64697-7-1
)	
CHARLES DELAURO,)	
)	
Respondent.)	

DECLARATION OF SERVICE

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

THAT ON THE 23RD DAY OF FEBRUARY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHARLES DELAURO
20638 5TH AVENUE SOUTH
DES MOINES, WA 98101

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF FEBRUARY, 2011.

x *Patrick Mayovsky*