

64697-4

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NO. 64697-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

CHARLES EDWARD DELAURO
AND
RODRIGO HERNANDEZ,

Respondents.

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COURT OF APPEALS
DIVISION I
FILED

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRIAN GAIN

BRIEF OF APPELLANT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JAMES M. WHISMAN
Senior Deputy Prosecuting Attorney
Attorneys for Appellant

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ASSIGNMENT OF ERROR

The trial court erred in entering an order barring the State from filing with the clerk of the court a Western State Hospital (“WSH”) report that was considered by the judge in ruling on the defendants’ competency to stand trial.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Does a trial court thwart the open administration of justice by preventing the filing of a WSH competency report in a criminal case to protect alleged privacy interests of a defendant, where the court failed to apply the relevant constitutional analysis and wholly barred filing of the report, rather than simply sealing the report?

C. FACTS

1. HERNANDEZ

Rodrigo Hernandez entered a store, tried to leave without paying for beer and, when a man tried to stop him, he stabbed the man in the face just below the eye with a steak knife. The knife broke, leaving the blade imbedded in the victim's face. Hernandez

fled but was arrested later. CP(H) 2.¹ Hernandez was charged with Assault in the First Degree. CP(H) 1.

While pending trial, the court ordered Hernandez evaluated by Western State Hospital to determine if he was competent to stand trial. CP(H) 5-8. WSH issued its report, which the superior court read and relied on as a basis for determining competency. Although the trial court had ordered WSH to file the report in the court record and serve a copy upon the parties, WSH served the report upon the parties, but did not file it with the court. At the hearing where the court found the defendant competent, the court declined to file the report, even though it used the report as a basis for its decision. CP(H) 11-12. The State filed a written objection to the court's refusal to file the report. CP(H) 13-44.²

2. DELAURO

Charles Delauro appeared at Highline Medical Center, claimed to be suicidal, and told security officers that he had left his car in the parking garage with a bomb sitting on the front seat. The

¹ The clerk's papers will be cited as CP(H) for Hernandez and CP(D) for Delauro.

² Hernandez subsequently pled guilty to attempted murder in the second degree. CP(H) 59-78. He was sentenced to 145 months in prison. CP(H) 88-97.

hospital was shut down for several hours as bomb-squad personnel responded. It turned out that the bomb was not real. Delauro claimed that he hoped police would shoot him. He apparently has a history of similar behavior. CP(D) 2-7. Delauro was subsequently charged in King County Superior Court with Malicious Placement of Imitation Explosive Device Second Degree. CP(D) 1.

On May 12, 2009, the trial court ordered Delauro evaluated by Western State Hospital to determine if he was competent to stand trial. CP(D) 10-13. On June 24, 2009, an order for further commitment and evaluation was filed. CP(D) 14-16. On October 15, 2009, based on a report prepared by WSH, the superior court found Delauro competent. CP(D) 29-30. As with the Hernandez case, the trial court refused to file the WSH competency report so the State filed a written objection asking the court to file the report. CP(D) 31-64.³ Delauro filed a response opposing the State's motion. CP(D) 93-97.

³ On November 19, 2009, Delauro pled guilty to an amended information charging Attempted Threats to Bomb or Injure Property. CP(D) 66-77. He was sentenced on December 7, 2009 to 12 months in the King County Jail, with credit for 300 days served. CP(D) 98-107.

3. TRIAL COURT RULING

On November 20, 2009, the superior court heard the State's motions in Hernandez and Delauro. The State argued that Art. 1, § 10 of the Washington State Constitution requires that justice be administered openly, that under the superior court rules the court had a duty to file any document relied upon to make its decision, that the duty extended to WSH reports, and that any privacy interests of the defendant could be protected by sealing, redacting or filing the report as a pre-trial exhibit. CP(D) 31-64; CP(H) 13-44; RP 2-7, 14-15. Hernandez's counsel did not object to filing the WSH report, saying he did not "find the information in this report to be particularly prejudicial or private in the sense that we might expect psychological evaluations or medical records to be private." RP 15. He also made clear that he would not have sought to seal the report even if it were filed. RP 16. Delauro's counsel objected, arguing that the information in the report was private and should not be filed. RP 7-12.

After considering the arguments of the parties, the court ordered that the WSH report should not be filed with the clerk of the superior court. CP(H) 48-49; CP(D) 106-07; RP 17-23. In particular, the court ruled that it had to balance the right to open

justice with the privacy and due process rights of the defendant, that the competency evaluation procedure existed to protect the defendant's due process rights, that the defendant should not have to sacrifice privacy to protect his due process rights, and that the only way to protect these rights would be to prevent filing of the document in the superior court file. Id. The court said "we need guidance ultimately from the Supreme Court on how to handle this, or from the legislature . . . Id. at 21. The court said:

I am satisfied that filing the report and sealing it is not the appropriate way to handle it, although that could be the Supreme Court's decision as the way to proceed. Clearly, a record needs to be made as to what the court considered, if there is testimony, whether its written or oral testimony, for various professionals, all of that would be part of the record that may or may not be sealed. But I am satisfied that that is (sic) separate issue. Of course, if there is a competency contest, then a record has to be made. In most cases that the court hears, there is not a contested competency issue. I am satisfied and have so ruled that it is the better procedure to just indicate the court is relying on a particular report from the hands of Western State Hospital. And of course the oral record is made at the same time.

RP 20-21. The State sought discretionary review of this order and review was granted. CP(H) 47-49; CP(D) 108-11.

D. ARGUMENT

The superior court judge in these cases decided that the WSH reports considered as part of a competency hearing should not be filed with the superior court clerk. Rather, the judge decided that the reports should be kept by the judge and the parties in some unspecified location. Since the records were not filed with the clerk the court did not consider whether the records could be sealed pursuant to GR 15. The State respectfully asks this Court to hold that the trial court erred in failing to direct the filing of these documents and in failing to analyze whether any or all of the reports should be filed under seal. The state constitution and procedural rules of the superior court all require that documents be filed to ensure the open administration of justice, and to ensure an adequate basis for appellate review.

1. DOCUMENTS CONSIDERED BY A JUDGE IN MAKING HIS DECISION MUST BE FILED WITH THE CLERK AND AVAILABLE FOR PUBLIC REVIEW.

The state constitution mandates that "justice shall in all cases be administered openly. . . ." Art. I, § 10. Justice can be administered openly only when the public can access the documents relied upon when a judge is making a decision. Thus,

“it is the policy of the courts to facilitate access to court records.”

GR 31(a). “Court records” include any document that is

“maintained by the court in connection with a judicial proceeding.”

GR 31(c)(4). “All pleadings and papers . . . required to be served

upon a party shall be filed with the court either before service or

promptly thereafter.” CR 5(d)(1). CR 5 governs the service and

filing of written motions in criminal causes. CrR 8.4.

A court record may be sealed only if the proponent of closure follows specific procedures. GR 15. Washington Courts have made it clear that proceedings cannot not be kept from public view unless specific findings are made. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982); State v. Bone-Club, 128 Wn.2d 254, 258-59, 261, 906 P.2d 325 (1995).

These requirements apply equally to documents. In Dreiling v. Jain, 151 Wn.2d 900, 93 P.3d 861 (2004), the Supreme Court held that private documents submitted during civil discovery must be filed with the superior court if considered by the judge ruling on a motion for summary judgment. In Rufer v. Abbott Laboratories, the Court said:

. . . [T]he public's right to the open administration of justice . . . is not concerned with merely whether our courts are generating legally-sound results. Rather,

we have interpreted this constitutional mandate as a means by which the public's trust and confidence in our entire judicial system may be strengthened and maintained. . . . To accomplish such an ideal, the public must-absent any overriding interest-be afforded the ability to witness the complete judicial proceeding, including all records the court has considered in making any ruling, whether "dispositive" or not.

154 Wn.2d 530, 549, 114 P.3d 1182 (2005) (internal citation omitted). The right to open justice requires disclosure whenever documents are instrumental in the process of determining guilt or innocence or judicial resolution of a civil controversy, but the right does not extend to personal notes the judge has made about past cases. Beuhler v. Small, 115 Wn. App. 914, 920, 64 P.3d 78 (2003), *citing* Seattle Times Co. v. Eberharter, 105 Wn.2d 144, 156, 713 P.2d 710 (1986). *See also* State v. Waldon, 148 Wn. App. 952, 956-57, 202 P.3d 325 (2009) (trial court erred in granting a motion to seal a vacated record of conviction under revised GR 15 without incorporating the Ishikawa factors into its analysis); Indigo Real Estate Services v. Rousey, 151 Wn. App. 941, 215 P.3d 977 (2009) (trial court in an unlawful detainer action was required to apply the Ishikawa factors before sealing the petitioner's full name); In re Marriage of R.E., 144 Wn. App. 393, 183 P.3d 339 (2008) (family court records are presumptively open); State v. Coleman,

151 Wn. App. 614, 214 P.3d 158 (2009) (confidential juror questionnaires could not be sealed without inquiry); Woo v. Fireman's Fund Ins. Co., 137 Wn. App. 480, 154 P.3d 236 (2007) (insurance company's claims manual admitted as exhibit should not be sealed).

There is no automatic or blanket exemption for quasi mental health records. In re Detention of D.F.F., 144 Wn. App. 214, 183 P.3d 302, review granted, 164 Wn.2d 1034 (2008) (Superior Court Mental Proceedings Rule that provided that mental illness commitment proceedings should not generally be open to the public violated the state constitution). If a blanket mental health exemption had been intended, the exemption would have been explicit, as is the exemption for certain health care and financial records filed in family law and guardianship cases. See GR 22. Individualized consideration of interests must be made in each case. Allied Daily Newspapers of Washington v. Eikenberry, 121 Wn.2d 205, 848 P.2d 1258 (1993) (unconstitutional to impose blanket statutory ban on release of names of child sexual abuse victims). In any event, the records can be considered by the court in balancing the public's right to access with a litigant's personal interests, under GR 15 and the Ishikawa factors.

The legal standard for sealing or redacting records is reviewed de novo, but a trial court's decision on a given motion to seal or redact records is reviewed for an abuse of discretion.

Indigo Real Estate Services, 151 Wn. App. at 946.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO FILE A DOCUMENT CONSIDERED BY THE COURT TO ESTABLISH COMPETENCY.

A defendant may not be convicted and punished unless he is competent, and he cannot silently waive a competency finding simply by entry of a guilty plea. In re Personal Restraint of Fleming, 142 Wn.2d 853, 861, 16 P.3d 610 (2001). RCW 10.77.060 mandates that when "there is reason to doubt" a defendant's competency to stand trial, the court must appoint two qualified experts to examine and report on the mental condition of the defendant. RCW 10.77.060(1)(a). RCW 10.77.065(1)(a)(i) provides that "the facility conducting the evaluation shall provide a report and recommendation to the court in which the criminal proceeding is pending." These procedures for determining competency are mandatory. State v. Marshall, 144 Wn.2d 266, 27 P.3d 192 (2001) (trial court erred in failing to follow mandatory procedures when defendant alleged he was not competent to enter

a guilty plea). 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 for determining competency can be a due process violation. State v. Heddrick, 166 Wn.2d 898, 904, 215 P.3d 201 (2009). Thus, WSH reports are instrumental on the question of whether a defendant is competent to stand trial.

The trial court's ruling in these cases keeps WSH competency reports from public view by barring their filing in the first instance. The ruling thwarts the careful balancing of constitutional interests required by the precedents and court rules listed above. If a WSH document is not filed, the public cannot assess the reasoning of the parties or the court in a given case. If WSH reports are *routinely* not filed, the public cannot examine or analyze patterns of judicial or prosecutorial decision-making on competency and mental health issues. Such a practice is the antithesis of the open administration of justice, and cannot be reconciled with the long line of authority insisting that records considered by the court be available for public inspection. With all due respect to the court below, its ruling was an incorrect application of that authority, and an abuse of discretion.

Moreover, if WSH reports are routinely refused for filing, the likelihood increases that cases raising competency challenges will be appealed without an adequate record for appeal, as occurred in State v. Heddrick. It is simply no answer that the report is kept at Western State Hospital. See RP 20. The issue on appeal is what information was presented to and considered by the judge. Multiple reports are sometimes prepared as to defendants who are evaluated multiple times, reports are sometimes amended, and sometimes a report will cross-reference another report. Under such circumstances, it is imperative that the superior court record contain the reports actually considered by the judge, rather than requiring appellate litigants to reconstruct and then try to determine after the fact which reports sitting in file drawers at Western State Hospital actually served as the basis for a judge's decision.

Nor is it pertinent to distinguish, as the trial court did, between contested and non-contested competency hearings. See RP 20-21. A competency determination made on one day may be challenged later if the defendant decompensates. Or, a competency decision that is agreed in the trial court may be raised on appeal, as occurred in State v. Heddrick. These practical considerations undermine the distinctions made in the trial court's

ruling, and emphasize the importance of filing documents in the superior court file for public and appellate review.

E. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to reverse the trial court's order that prevented the State from filing WSH reports. The matter should be remanded with instructions to file the documents with the clerk. If a motion to seal is brought pursuant to GR 15, that motion can be considered in accord with the relevant constitutional requirements.

DATED this 13th day of September, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
Attorneys for Appellant
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Broman, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Appellant, in STATE V. CHARLES EDWARD DELAURO, Cause No. 64697-4-I consolidated with Cause No. 64698-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Sean Wickens, the attorney for the appellant, at Wickens Oliver PS, 602 S. Yakima Avenue, Tacoma, WA 98405-4801, containing a copy of the Brief of Appellant, in STATE V. RODRIGO HERNANDEZ, Cause No. 64698-2-I consolidated with Cause No. 64697-4-I, in the Court of Appeals, Division I, for the State of Washington.

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