

NO. 70912-7-I

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

REC'D
FEB 11 2014
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

HUNG MING HOANG,

Appellant.

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

The Honorable Sean P. O'Donnell, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant Hung Minh Hoang's due process right to a fair trial by placing the burden on him to prove he was not competent to face trial.

2. The State deprived Hoang's due process right to notice by charging him with violating a no-contact order issued on a different date than the no-contact order at issue.

3. The State failed to prove Hoang violated the no-contact order beyond a reasonable doubt.

Issues Pertaining to Assignments of Error

1. Should the burden of proving a criminal defendant is competent to stand trial, after a trial court orders a competency evaluation, be placed on the State?

2. Did the State violate Hoang's due process right to notice of the charges by alleging in the information that he violated a no-contact order issued on a different date than the no-contact order at issue?

3. The court issued three no-contact orders prohibiting Hoang from contacting his ex-wife. One order, issued in 2003, remained in effect when Hoang engaged in the conduct that spawned the instant charges. Another order, issued in 2002, expired in 2005. A third, issued in 2004,

expired in 2009. Hoang's wife did not know the 2003 order was still valid when she called police in June 2012. Under these circumstances, did the State fail to prove Hoang knowingly violated the 2003 order beyond a reasonable doubt?

B. STATEMENT OF THE CASE

The State charged Hung Hoang with four counts of violating a domestic violence no-contact order protecting his ex-wife, Bang Yen Quang. The State alleged the crimes against Ms. Quang involved domestic violence. CP 62-64.

Hoang's counsel moved to have Hoang evaluated for competency. The court granted the motion and ordered Hoang transported to Western State Hospital (WSH) for observation and evaluation. CP 7-12, 22-27. Psychologist Elizabeth Bain met with Hoang when he first arrived at the hospital and evaluated him a week later. RP 68-69, 72. Hoang was open and cooperative with staff. RP 74, 82. Hoang told Bain he believed the no-contact order had expired. RP 74-75. Hoang related the events leading to his arrest consistently with this contained in the police report. RP 75-76.

Hospital staff notes indicated no unusual behaviors indicative of mental illness. RP 77. Hoang did not present with symptoms suggestive

of mental illness, had no history of a mental illness diagnosis or traumatic brain injury and denied all symptoms of mental illness. Despite believing Hoang did not have a mental disease or defect, Bain conducted a complete competency evaluation. RP 77-79, 87-88, 96-97. Hoang had trouble understanding the charges against him and the court process, but demonstrated an ability to comprehend and learn information that was told to him about those subjects. RP 100. Bain concluded Hoang was competent. RP 88. In support of her testimony, Bain filed a competency report with the court. CP 28-33.

Neurophysiologist Tedd Judd evaluated Hoang on behalf of the defense. RP 7-8. Judd diagnosed Hoang with probable paranoid schizophrenia. RP 9, 19. Hoang initially refused to meet with Judd, stating he was the president and the chief marshal of Vietnam. He also said Judd needed to arrange with the consulate in Texas to be permitted to speak with Hoang and that he had nothing to discuss. RP 11. He also expressed concern that Judd might be able to give him the electric chair or a lethal injection. RP 11.

Hoang eventually relented and spoke with Judd. He made many other bizarre statements during the evaluation. RP 11-13. Judd gave Hoang several tests to evaluate cognition. RP 13-16. When Judd asked

Hoang questions about the charges and his legal situation, Hoang did not answer consistently and made delusional statements, such as that after police arrested him, they quit their jobs and joined his organization in Vietnam. RP 17. Hoang indicated a general understanding of what a prosecutor, defense attorney, and judge did. RP 18. He did not understand the charges could result in deportation. RP 19.

Judd concluded Hoang was not competent because of a mental disease or defect. RP 26-27. Judd said he would not have been able to make his diagnosis was limited to the information Bain relied on. RP 28. Judd wrote a report that defense counsel attached to his memorandum in support of a competency finding. CP 35-57.

After hearing argument from counsel, the trial court found there was no evidence to support Judd's diagnosis, and no existence of a mental disease or defect. CP 58-60; RP 114-17. The court concluded Hoang was competent to stand trial. RP 116.

The case proceeded to trial and the jury found Hoang guilty as charged. CP 81-84. The trial court imposed 54-month standard range concurrent sentences. CP 109-17.

C. ARGUMENT

1. THE TRIAL COURT DEPRIVED HOANG OF DUE PROCESS BY PLACING ON HIM THE BURDEN OF PROVING INCOMPETENCE.

The court's decision find Hoang competent for trial violated his due process right to a fair trial. This Court should reverse Hoang's convictions.

"No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." RCW 10.77.050. The conviction of an accused while he is legally incompetent violates his constitutional right to a fair trial under the due process clause of the Fourteenth Amendment. Drope v. Missouri, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); In re Personal Restraint of Fleming, 142 Wn.2d 853, 861, 16 P.3d 610 (2001).

A person is competent if he can understand the nature of the proceedings against him and assist in his own defense. RCW 10.77.010(15); State v. Ortiz, 104 Wn. 2d 479, 482, 706 P.2d 1069, 1072 (1985), cert. denied, 476 U.S. 1144 (1986). Competence requires the mental awareness to comprehend the evidence and "the ability to communicate with counsel in helping prepare an effective defense." Odle v. Woodford, 238 F. 3d 1084, 1089 (9th Cir. 2001), cert. denied, 534 U.S.

888 (2001). The question here, whether it is error to place the burden of establishing competence on the defendant, is reviewed de novo. See State v. S.J.W., 170 Wn.2d 92, 97, 239 P.3d 568 (2010) (whether court should presume child is competent to testify as witness is reviewed de novo).

Due process requires the trial court to comply with the procedures established by the Legislature in Chapter 10.77 RCW. State v. Heddrick, 166 Wn.2d 898, 904, 215 P.3d 201 (2009). The United States Supreme Court accords great deference to the State regarding the allocation of the burden of proving competency. Medina v. California, 505 U.S. 437, 445-46, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992).

In Washington, RCW 10.77 places the burden on the State to prove a defendant competent to stand trial after the court has found reason to doubt his competency. In State v. Wicklund, our Supreme Court stated the burden of establishing competency under RCW 10.77.060 is placed on the State. 96 Wn.2d 798, 805, 638 P.2d 1241 (1982) ("The need for [complying with the procedures of RCW 10.77 by requiring two] expert opinions is even greater here, since the burden of establishing Mr. Wicklund's competency was placed on the State."). The burden has been similarly applied to the State under RCW 10.77.086 regarding restoration of competency. State v. Hurst, 158 Wn. App. 803, 805, 244 P.3d 954

(2010), aff'd. on other grounds, 173 Wn.2d 597 (2012). The State also bears the burden under RCW 10.77.090. See Born v. Thompson, 154 Wn.2d 749, 753-54 n.6, 117 P.3d 1098 (2005) (agreeing with State's concession that it bears the burden of proof under former RCW 10.77.090 and applying burden to State).

Placing the burden on the State to prove competency is consistent with statutory competency provisions. RCW 10.77.060 requires a court to order a mental health evaluation whenever there is reason to doubt the defendant's competency. In that situation, the court must appoint qualified experts to determine whether the defendant is competent to stand trial. Id. Once a court orders an evaluation, therefore, the court has implicitly found at least a lack of a presumption of competence. At that point, it is consistent with due process to place the burden of proving competence on the State.

Hoang expects the State will contend his argument should be rejected based on State v. Coley¹ and State v. P.E.T.² In Coley, the court declared that because criminal defendants are presumed competent, it is

¹ 171 Wn. App. 177, 179, 286 P.3d 712 (2012), review granted, 176 Wn.2d 1024 (2013).

² 74 Wn. App. 590, 300 P.3d 456 (2013), petition for review stayed (No. 89157-5, 12/11/2013).

the defendant's burden to show he is incompetent in the first instance. 171 Wn. App. at 179. There are two reasons for this Court to reject Coley's pronouncement. First, it cited no authority for the proposition that a defendant shoulders the burden of proving incompetency. Second, this portion of the opinion is dicta. The question presented in Coley was whether the trial court erred by placing the burden on the defendant to show he remained incompetent *after* the court had previously adjudicated him incompetent. 171 Wn. App. at 186. The Court thus had no need to determine which party bears the burden in the first instance. See State v. Johnson, 159 Wn. App. 766, 777 n.6, 247 P.3d 11 (2011) (statements unrelated to issue before court and unnecessary to decision are dicta). Such statements need not be followed. In re Personal Restraint of Domingo, 155 Wn.2d 356, 366, 119 P.3d 816 (2005).

For the same reason, it was not necessary for this Court in P.E.T. to address the defendant's contention that the State has the burden of proving competence in the first instance. State v. P.E.T., 174 Wn. App. 590, 596, 600, 300 P.3d 456 (2013), petition for review stayed (No. 89157-5, 12/11/2013) (earlier finding that accused was incompetent raised common law presumption that he remained incompetent, thereby requiring State to rebut presumption). Furthermore, this Court observed that an oft-cited

commentator wrote the defendant bears the burden of proving incompetence "by a preponderance of the evidence." P.E.T., 174 Wn. App. at 597 (quoting 12 Royce A. Ferguson, Jr., Washington Practice: Criminal Practice & Procedure § 907 (3d ed. 2012)). The commentator relied on Medina and Cooper v. Oklahoma, 517 U. S. 348, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996).

Neither Medina nor Cooper, however, supports the assertion because neither placed the burden on the accused. Medina held only that a state could constitutionally place the burden on the defendant, not that it was required to do so. 505 U.S. at 449. Cooper followed Medina in that regard, but the real question was whether the State could require the accused to prove incompetence by clear, cogent and convincing evidence. 517 U.S. at 355-56.

For these reasons, this Court should find the trial court erred by placing the burden of proving incompetency in the first instance on the accused. The court's error deprived Hoang of due process.

2. THE STATE VIOLATED HOANG'S DUE PROCESS RIGHT TO BE NOTIFIED OF THE CHARGES HE FACED.

The State charged Hoang in each of the four counts with violating a no-contact order issued November 3, 2006. CP 62-64. The no-contact

order Hoang allegedly violated in the first half of 2012, however, was issued November 10, 2003. Ex. 1; RP 265-66. A second no-contact order, issued May 10, 2004, expired May 7, 2009. Ex. 2. The State's incorrect reference to a 2006 order deprived Hoang of his constitutionally required notice of the charges he faced.

Criminal defendants have a right to be fully informed of the nature of the charges against them so they can prepare a sufficient defense. City of Bothell v. Kaiser, 152 Wash. App. 466, 471, 217 P.3d 339 (2009). Due process requires the State to allege each element of a crime in the information, as well as facts support every element. Const. art. 1, §§ 3, 22; U.S. Const. amends. 5, 6, 14; State v. Kjorsvik, 117 Wn.2d 93, 97-98, 812 P.2d 86 (1991).

When reviewing a challenge to the language in a charging document for the first time on appeal, courts must resolve two questions. Id., 117 Wn.2d at 105. Courts first determine whether "the necessary facts appear in any form, or by fair construction can they be found, in the charging document" and liberally construe the language in favor of finding it sufficient. Id., at 105-06. A court reviews only the face of the charging document in making this determination. State v. Zillyette, 178 Wn.2d 153, 162, 307 P.3d 712 (2013); State v. McCarty, 140 Wn.2d 420, 425,

998 P.2d 296 (2000); State v. Franks, 105 Wn. App. 950, 957, 22 P.3d 269 (2001); see City of Seattle v. Termain, 124 Wn. App. 798, 803, 103 P.3d 209 (2004) (defendant must be notified of elements as well as conduct alleged to have constituted crime "within the four corners of the charging document."). Second, courts consider whether the defendant can show actual prejudice caused lack of notice. Kjorsvik, 117 Wn.2d at 105–06.

If the information cannot be read to give notice of or to in some way contain the essential elements of the charge, the broadest reading cannot save it. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). If the required elements "are neither explicitly stated nor fairly implied, reversal follows without any inquiry into the prejudice to the defendant." Id. at 428.

The State charged Hoang in pertinent part as follows, but for changes in the charging periods:

That the defendant, Hung Minh Hoang . . . on or about [], did knowingly and willfully violate the terms of a court order *issued on November 3, 2006* by the King County Superior Court pursuant to RCW chapter 10.99, for the protection of Bang Yen Quang, and at the time of the violation having at least two prior convictions for violating the provisions of an order issued under RCW chapter 10.99, 26.50, 26.09, 26.10, 26.26 or 74.34, or under a valid foreign protection order as defined in RCW 26.52.020;

Contrary to RCW 26.50.110(1), (5), and against the peace and dignity of the State of Washington.

CP 62-64 (emphasis added).

The problem for the State is the charges were in fact based on a violation of a 10-year no-contact order issued November 10, 2003. Ex. 1. This flaw implicates this Court's decision in Termain. In Termain, the complaint alleging a violation of a no-contact order tracked the language of the ordinance and specified the dates of the charging period, but failed to "specifically identify the order claimed to be violated or the court granting the order." Termain, 124 Wn. App. at 803.³ As well, the

³ The complaint read in pertinent part as follows:

Between June 11, 2002 and June 16, 2002 . . . the above-named defendant did commit the following offense(s):

Count 1 [or Count 2] Commit the crime of VIOLATION OF A DOMESTIC VIOLENCE ORDER by knowingly violating a restraint provision, a provision excluding him or her from a residence, workplace, school or daycare or a provision prohibiting him or her from knowingly coming within or knowingly remaining within a specified distance of a location of an order granted under Seattle Municipal Code Chapter 12A.06 by Seattle Municipal Court or of an order granted under Revised Code of Washington Chapter 10.99, Chapter 26.09, Chapter 26.10, Chapter 26.26, Chapter 26.50, Chapter 74.34 or an equivalent ordinance by a court of competent jurisdiction or knowingly violating a provision of a foreign protection order specifically indicating that a violation will be a crime issued by a court having jurisdiction over him or her and the person protected by the order and the matter under the law of the state, territory, possession, tribe or United States military tribunal, Contrary to Seattle Municipal Code Section(s): 12A.06.180-A

Termain, 124 Wn. App. at 800-01.

complaint contained no factual basis for the charges and did not identify the victim. Id., 124 Wn. App. at 803. Because of these shortcomings, the Court of Appeals affirmed the superior court's reversal of the conviction. Id. at 806.

In Hoang's case, the State also failed to "specifically identify the order claimed to be violated," or to allege a factual basis for the charges. Cf., State v. Snapp, 119 Wn. App. 614, 620, 82 P.3d 252 (court rejected challenge to sufficiency of information that specified orders by date issued and case number, and alleging defendant violated orders by "hitting and kicking" victim), review denied, 152 Wn.2d 1028 (2004). As this Court held in Termain, "the culpable act necessary to establish the violation of a no-contact order is determined by the scope of the predicate order." 124 Wn. App. at 804. It is therefore essential for the defendant to know specifically what order he is charged with violating and how he violated it. That was not possible from the language of the information.

City of Bothell v. Kaiser is also instructive. There the citation contained no information identifying the no-contact order alleged to have been violated or the protected person. It contained no additional information about the facts underlying the charge other than the date and location of the offense. 152 Wn. App. at 476. Citing Termain, this Court

held the citation, by failing to identify the specific order or its scope, lacked essential elements of the charged offense. Id.

Termain and Kaiser highlight the deficiency on the information in Hoang's case. By failing to identify the correct no-contact order, the State deprived Hoang of his constitutional right to notice. This Court should reverse his convictions and remand without prejudice.

3. THE STATE FAILED TO PROVE HOANG KNEW HE WAS VIOLATING A VALID NO-CONTACT ORDER BEYOND A REASONABLE DOUBT.

Due process requires the State to prove each essential element of a crime beyond a reasonable doubt. State v. A.M., 163 Wn. App. 414, 419, 260 P.3d 229 (2011). In assessing a challenge to the sufficiency of the evidence, a reviewing court views the evidence in the light most favorable to the State. State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). The question is whether a rational fact finder could have found the essential elements of the offense beyond a reasonable doubt. State v. Budik, 173 Wn.2d 727, 733, 272 P.3d 816 (2012).

To sustain a charge of willful violation of a court order the State must prove the defendant had willful contact with another, a valid no-contact order prohibited such contact, and the defendant knew of the order. RCW 26.50.110(1)(a); State v. Washington, 135 Wn. App. 42, 49, 143

P.3d 606 (2006). The State failed to prove Hoang knew the order remained in effect.

Hoang, a native of Vietnam, did not speak English. RP 258. His ex-wife, Quang, came to the United States in 2000 and spoke primarily Cantonese. RP 220-22. Hoang came later and lived with Quang. RP 223. Quang did most of the speaking on behalf of Hoang. RP 239-40. In late 2002, Hoang assaulted Quang and was convicted of fourth degree assault. RP 223, 260; Ex. 8. The court issued a no-contact order that was to expire in July 2005. Ex. 6. RP 223. In 2003, Hoang stabbed Quang and was convicted of second degree assault. RP 224-25, 260, 265-66; Exs. 5, 7, 8. A 10-year no-contact order issued in November 2003. Ex. 265-67, Ex. 1. Hoang was convicted of violating that order in 2004. RP 268-69; Ex. 3. As a result of that conviction, the court issued a 5-year no-contact order in May 2004. Ex. 2. That order expired before the charging period of the instant case from March to July, 2012.

Upon his release in 2004, Hoang moved to San Francisco and did not return to Seattle until 2011. RP 227-28, 252-53. Quang divorced Hoang in 2005. RP 228. She nevertheless helped him find a place to stay and paid his rent when he returned in 2011 because she feared he would look for her and cause trouble. RP 228-29, 253-54. Quang also helped

Hoang obtain a government identification card because he could not speak English. RP 228, 258, 312.

Despite her help, Hoang came to Quang's workplace once or twice a week to ask her for money. RP 229-30. If she declined, Hoang would curse, threaten Quang, and cause a disturbance. RP 230-32, 310-12. Quang finally called police in June 2012 when Hoang threatened her at her workplace. RP 232, 254-57. She was unaware the 2003 no-contact order was in effect when she called police. RP 254. This is consistent with the initial report of a "disturbance" to which officers responded. RP 270. Hoang did not refer to a no-contact order during his visits to her workplace. RP 271.

Hoang's defense was that he did not knowingly violate the 2003 no-contact order because he did not know it was still valid. RP 341-50. The above facts support this defense. Hoang's criminal history produced a confusing overlap in no-contact orders with different expiration dates. In addition, Hoang had no contact with Quang – and did not even live in Washington – for seven years. During this period, two of the no-contact orders expired.

Furthermore, Quang tolerated Hoang's repeated harassment and did not know the 2003 no-contact order remained in effect. For all these

reasons, the State failed to prove Hoang knowingly violated a no-contact order. This Court should reverse Hoang's convictions and remand for dismissal with prejudice.

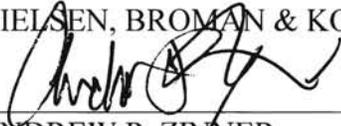
D. CONCLUSION

This Court should reverse Hoang's convictions and remand for dismissal with prejudice, or alternatively, reverse the convictions and remand for dismissal without prejudice. Alternatively, this Court should reverse the trial court's order finding Hoang competent and remand for retrial.

DATED this 10 day of February, 2013.

Respectfully submitted,

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