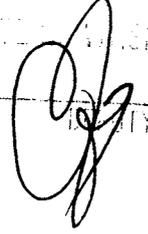


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No. 33436-4-II

**IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON

vs.

JOE ANDREW GALLEGOS

**APPEAL FROM THE SUPERIOR COURT
FOR KITSAP COUNTY**

BRIEF OF APPELLANT

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PM 1-3-06

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A. INTRODUCTION

The trial court erred when it made no further inquiries into the competency of the defendant and summarily denied the motion for a mental health evaluation.

B. ASSIGNMENT OF ERROR

Did the trial judge err in not questioning the defendant as to his mental state at the time of the trial and by not making record as to the competence of the defendant?

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

On October 19, 2004, The defendant Joe A. Gallegos was arraigned on a one count information alleging Rape of a child in the 3rd Degree, in violation of RCW 9A.44.079. The allegations were alleged to have occurred sometime between December 1, 2003 and December 25, 2005. He was alleged to have had intercourse with SMW who at the time of the alleged rape was 14 years of age. CP 1. Mr. Gallegos was advised of his rights and an attorney was appointed for him. A plea of not guilty was entered and the matter was set for trial for December 10, 2004. CP 4.

A number of continuances of the trial date occurred all with the acquiescence of the defense or at their request. On May 2, 2005, the matter was set for trial and the parties appeared. Mr. Kibbe, the appointed counsel for the defendant filed a motion for an evaluation of the defendant and on the record told the court that he now had questions as to the competency of his client. CP 63, VRP May 2, 2005 at pg. 3-7. Kibbe put on the record that he had reason to doubt the present competency of his client. This was based on medical information he had obtained and things the defendant was saying to him. Defense counsel however did not file an affidavit in support of the motion for the Western State Hospital competency evaluation. CP 63. The court asked no questions of the defendant or made any attempt to make an independent record to determine if Mr. Gallegos was competent or not and summarily denied the request for the continuance and the evaluation. The court advised that the matter was to be tried at 1:30 that day and that the parties should check with the court scheduler VRP May 2, 2005, at pg. 8. The motion was not brought up to the trial judge by the defense counsel.

An amended information was filed on the May 2, 2005, the day of trial without objection, charging an additional two counts of Rape of the Child in the 3rd Degree, with the same victim. CP 65. Not guilty pleas were

entered. On May 4, 2005 a second amended information was filed changing the dates of the alleged offense in one count again without objection. CP 68. No objections were taken to the court's instruction. On May 10, 2005, the court reconvened and the jury returned a verdict of guilty to all three counts charged in the Second Amended Information. CP 76. The defendant was detained, a pre-sentence report was ordered and the matter was continued to June 17, for sentencing. The defendant was given a term of 60 months and three years of community custody. CP 82. He timely filed a notice of appeal, counsel was appointed and the matter is now before this court.

D. STATEMENT OF THE CASE

SMW, the alleged victim in this case was the girlfriend of Joey Gallegos, the teenage son of the defendant Joe Gallegos. VRP May 4, 2005 at pg. 71. They began dating in 2003, and SMW was allowed to sleep over in the Gallegos' home in the room of the son, Joey. VRP 73- During the pre-trial hearings the State moved in limine to keep from the jury that SMW was in a sexual relationship with the son Joey, this was not objected to by the defendant's counsel, although it would have provided some indication to the jury of why there were pictures of SMW in a negligee' that he had in his possession and how they came into the hands of the defendant. The sleeping

arrangement were with the consent of both teenagers' parents. SMW alleged that sometime in the month of December 2005, that she was sleeping with Joey when Joe senior came into the room. That he woke her up and threw her sock into the hall. VRP May 4, 2005 at pg. 77. When she went to retrieve the sock he forced her into his bedroom where he allegedly had vaginal sex with her against her will. He was alleged to have forced her onto the bed and pulled her pants down around her ankles and had intercourse with her while she laid on the bed and he stood on the floor. VRP May 4, 2005 at pg. 77 -79. She did not report the incident at that time and continued to date Joey after the incident. SMW continued to come to the Gallegos house. She claimed that on two of those occasions she again was forced to have sex with the defendant, once under very similar circumstances as the first incident VRP May, 4, 2005 at pg. 84; and the second time in an air bed in his Suburban . VRP May 4, 2005 at pg. 88. On this occasion, she claimed that she had come to the house to have a girls night with the defendant's wife who got intoxicated on screwdrivers to the point of passing out. VRP May 4, 2005 at pg. 87. Whereupon the defendant was alleged to have taken her to his truck where he forced her to have sex with him again. SMW was very vague as to dates or times or to recall any real detail of these events. It was

only after being shown what the child victim advocate had written down from her previous interviews could she be any more specific in her recollection of the dates or what she had said before. VRP May, 5, 2005 at pg. 161, This to was accomplished without objection. SMW claimed that the defendant had given her a ring, and asked her to marry her. Both claims were denied by the defendant. VRP May 4, at pg. 110.

In addition to the testimony of SMW, the State called her Mother, Sandra Woods, to testify regarding an incident which occurred in later in the year 2004, it was alleged that the defendant's mother came to SMW's house with her son and with his then girlfriend and that they were banging on the door yelling obscenities threatening SMW if she did not return keys of a vehicle that belonged to the defendant and blaming him for the defendant's overdose. VRP May 5, at pg. 166. The defendant had supposedly taken an overdose in an attempted suicide. This was ordered not to be revealed to the jury by the court on a ruling in limine. However it was disclosed without a renewed objection or request for curative instruction. According to the defendant's wife, she came to the residence of SMW to retrieve the keys, that SMW had taken from their home. The keys were from the family vehicle, which was needed to see the defendant in the hospital. There was also

testimony that the defendant had offered SMW's family a vehicle that he owned, according to the testimony it was an old KIA and not of much value. VRP, May, 5, 2005 at pg. 173.

Sandra Wood testified that her daughter had revealed the sexual relations between the defendant and SMW, the night the defendant's wife and her son came to their residence. However no disclosure was made to the authorities until months later, without objection. VRP May, 5, 2005 at pg. 169, No forensic evidence was offered. SMW claimed that she was afraid of the defendant and that is why she did not report it sooner. Although little testimony was offered as to why she might be afraid of him as no direct threats were given. VRP May, 4, 2005 at pg. 109.

The defendant offered the testimony of his wife, who claimed that she was not out of the house when SMW alleged that she was. VRP May 5, 2005 at pg. 209. She denied ever having a "girls night" with SMW and that she never drank screwdrivers as she claimed. VRP May 5, 2005 at pg. 214. She also corroborated the testimony of her husband that the only way he could have sex because of his back injury was lying on his back, and that he suffered from erectile dysfunction as well. VRP May 5, 2005 at pg. 217. She testified that she heard SMW threaten her husband with rape if he did not

give her some money. VRP May, 5, 2005 at pg 223.

The defendant denied that he had ever had intercourse with SMW. VRP May 9, 2005 at pg. 292. He did admit that she was at his house and he had comforted her on occasion when she was upset. VRP May 9, 2005 at pg. 288-289. Kissing her on the cheek. He also admitted to teasing her and his son, by taking her in the bedroom for a few seconds but that nothing had occurred in the room. The state also offered the testimony of two Bremerton Detectives where the defendant admitted to blowing up the pictures of SMW that he obtained from his son with the purpose of embarrassing SMW who had made according to the defendant false accusations of sexual relations between he and she. During the interrogation the defendant allegedly admitted that he had made out with SMW. VRP 136. The defendant denied that he had used the term made out, and merely had told the officers about having consoled SMW. VRP May, 9, 2005 at pg. 327.

The prosecutor was also allowed to go into a prior conviction of the defendant's wife for obstructing an officer. VRP 20. Again without objection. VRP 20 This became the retrial of the Mrs. Gallegos, the prosecutor was allowed to call the arresting officer to give his version of the events surrounding the conviction and to make it seem that she was lying on the

stand. Unfortunately, and again, without objection and unfortunately the door was opened by the defense counsel asking her about the nature of the crime on direct. VRP 204-205.

E. ARGUMENT

It is fundamental that no incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity continues. RCW 10.77.050. Indeed, the conviction of an accused while he is legally incompetent violates his constitutional right to a fair trial under the Fourteenth Amendment's due process clause. Drope v. Missouri, 420 U.S. 162, 172, 43 L. Ed. 2d 103, 95 S. Ct. 896 (1975); Pate v. Robinson, 383 U.S. 375, 378-86, 15 L. Ed. 2d 815, 86 S. Ct. 836 (1966); State v. Tate, 74 Wash. 2d 261, 263-64, 444 P.2d 150 (1968), appeal after remand, 1 Wash. App. 1, 458 P.2d 904 (1969); State v. O'Neal, 23 Wash. App. 899, 901, 600 P.2d 570 (1979). The test for competency to stand trial is whether the accused is capable of properly understanding the nature of the proceedings against him and whether he is capable of rationally assisting his legal counsel in the defense of his cause. RCW 10.77.010(6). See also State v. McDonald, 89 Wash. 2d 256, 265, 571 P.2d 930 (1977); State v. Gwaltney, 77 Wash. 2d 906, 907, 468 P.2d 433 (1970). State v. Wicklund, 96 Wash. 2d 798, 638

P.2d 1241 (1982)

The defense counsel in this case, though inarticulately put into issue the fact that he believed his client was incompetent to stand trial. Normally that would have been accomplished by a motion and affidavit as to specific facts that led the defense counsel to suspect that his client was not competent. Here, the defense counsel filed a motion for a Motion for Initial Evaluation for Competency, Insanity or Diminished Capacity, and or Other Ancillary Orders on the morning the case was going to trial, before the criminal presiding Judge, Jay Roof. It was not accompanied with a declaration or affidavit. But Mr. Kibbe did put on the record that over the week before the trial Mr. Gallegos, "brought to my attention some mental health history, of which I was not really aware" VRP May, 2, 2005, pg 3. The defense counsel went on to say:

"As far as defendant's background, Mr. Gallegos has informed me that for the last 20 years or so he has been dealing with various mental ailments, that just prior to the first alleged sexual encounter with the victim in this case— which would have been December 2003 - - he did suffer a head injury which he was hospitalized for and did rehabilitation work for psychology testing. Mr. Gallegos has also been doing ongoing psychological testing with a

psychologist out of Tacoma, which just concluded last Friday.” VRP May 2, 2005 at pg 3.

Later Mr. Kibbe went on:

“Yes, Your Honor, I guess I would say that the conversations I’ve had with him in the last week would give me some pause as to whether or not he is, perhaps competent, but I initially did not have concerns about competency in this case until Mr. Gallegos revealed to me his mental health history.” VRP May 2, 2005 at pg.4. Kibbe further went on to tell the court that the psychologist who had been treating the defendant had died and that he had not been able to contact him before his passing. He also told the court that the defendant was on psychotropic medications during this time period, which are revealed in the record, he was on pain medications as well as medications for depression. The defense counsel also had information as well as the prosecutions that the defendant had attempted to commit suicide in the not to distant past. Clearly, while inarticulately put before the court, the court was on notice that the defendant had a history of mental illness, that he was taking drugs which affected his ability to think and he was suffering from a depression.

Yet the court made absolutely no inquiry into Mr. Gallegos’ present

mental condition and just denied the motion for an evaluation out of hand.
VRP May 20, at pg. 7.

The proper procedure once the issue of competence was raised, would have been for the court to make an independent determination as to the competence of the defendant as the court did in Seattle v. Gordon, 39 Wn. App. 437, 693 P.2d 741(Div. 1, 1985) there the court had a colloquy with the defendant to determine if he understood the charges and the consequences of conviction, that he could relate the facts and was willing to have his attorney represent him the judge believed a competency hearing was not necessary.

Here the only record, is between the State's Counsel and the Defense Counsel, the court makes no independent evaluation of the defendant to determine if he is in fact competent to stand trial. "Incompetency" means a person lacks the capacity to understand the nature of the proceedings against him or to assist in his own defense as a result of mental disease or defect: RCW 10.77.010(6).

The court did not have to grant the defendant's motion for the sanity hearing, but it was required to make an independent finding as to whether the defendant was competent or at least to question his competence. To do that, the court needed to inquire of the defendant 1) If he had an apparent

understanding of the charge and the consequences of the conviction; 2) If he had a an apparent understanding of the facts giving rise to the charge; and 3) Whether he had the ability to relate the facts to his attorney in order to help prepare the defense. Here the court made no inquiry at all as to these important questions and simply denied the motion for the competency evaluation. The record is therefore barren to Mr. Gallegos' mental state at the time of the trial or his competency to stand trial.

This case, like Gordon the defense counsel made no declaration as to competency and filed the motion on the day of the trial after the case had been continued a number of times thus giving the impression that it was done for delay. But in Gordon the court did what it was required to do, determine if in fact there was a basis to doubt the competency of the defendant.

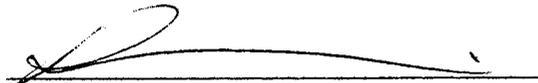
The determination of whether a competency examination should be held rests generally with the discretion of the of the trial court. State v. Israel, 19 Wn. App. 773, 577 P2d. 631 (1978). Among the factors a trial judge may consider in determining whether or not to order a formal inquiry into the competence of an accused include the defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports, and the statements of counsel. State v. Loux, 24 Wn. App. 545, 604

P.2d 177, (1979). Here the court made no findings as to any of these issues and merely denied the motion without any mention as to the what factors the court was considering in denying the motion.

A. CONCLUSION

The court should have made further inquiry of the defendant to determine if in fact the motion for the competency evaluation was in fact a delaying tactic or whether there were serious concerns as to the competency of the defendant without doing so the defendant was denied due process. The matter should be returned to th trial court to make a determination if the defendant was in fact competent at the time of the trial.

Respectfully submitted this 7 day of January, 2006.



Roger A. Hunko, WSBA 9295
Attorney for Defendant

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**IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,)
)
Plaintiff,)
)
v.)
)
JOE ANDREW GALLEGOS,)
)
Defendant.)

NO. 33436-4-II

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) ss:
COUNTY OF KITSAP)

Kelly Hayes, being first duly sworn on oath, does depose and state:

On January 3, 2006, I sent by U.S. mail, an original of APPELLANT'S BRIEF to the Court of Appeals, 950 Broadway Street, Suite 300, Tacoma, WA 98402.

On January 3, 2006, I sent by hand delivery a copy of the APPELLANT'S BRIEF to the appeals clerk, c/o Kitsap County Superior Court, 614 Division Street, Port Orchard, WA 98366.

On January 3, 2006, I sent by hand delivery a copy of the APPELLANT'S BRIEF to Randall Sutton, Kitsap County Prosecutor's Office, 614 Division Street, Port Orchard, WA

The Law Office

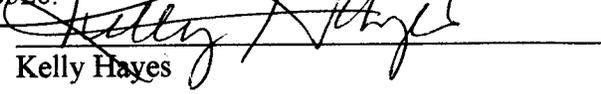
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On January 3, 2006, I sent by U.S. Mail a copy of the APPELLANT'S BRIEF to defendant, Joe Andrew Gallegoes, No. 841951, Stafford Creek Correction Center, 191 Constatine Way, Aberdeen, Washington 98520.



Kelly Hayes

SUBSCRIBED AND SWORN to before me this 3rd day of January, 2006.



Linette Zimmerman, Notary Public in and for
The State of Washington. My Commission
Expires: 12/9/06.