

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

STATE OF WASHINGTON,

Respondent,

v.

ALAN BRAZEE,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 APR - 1 PM 4:26

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

The Honorable Beverly Grant, Judge
The Honorable Frederick W. Fleming, Judge

FILED
COURT OF APPEALS
DIVISION II
09 APR - 6 AM 9:35

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURT VIOLATED BRAZEE'S DUE PROCESS RIGHTS IN PROCEEDING TO TRIAL WITHOUT OBSERVING ADEQUATE PROCEDURAL REQUIREMENTS TO DETERMINE COMPETENCY.

The State argues that the trial judge had broad discretion to decide whether a hearing was required, and Brazee has not shown abuse of discretion. Brief of Respondent (BOR) at 1, 19-20, 25. The question is not one of discretion. Rather, the question is whether Brazee received the due process to which he was entitled once the court found reason to doubt his competency.¹

The State confuses the court's discretion to order a competency evaluation with the mandatory duty to order a hearing after finding reason to doubt competency. It is within the trial court's discretion to order a competency evaluation. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001). Judge Nelson exercised her discretion by properly ordering a competency evaluation upon finding a reason to doubt Brazee's competency. CP 6-9. Once Judge Nelson made this critical threshold determination, however, it was no longer within the trial court's discretion to decline to hold an evidentiary hearing. A defendant's due

¹ This issue is currently pending in the Washington Supreme Court in State v. Steven Heddrick, Jr., No. 80841-4. Oral argument in Heddrick took place on January 20, 2009.

process right to a fair trial requires the trial court to conduct an evidentiary hearing whenever there is reason to doubt a defendant's competency, even if the defendant does not request such a hearing. See, e.g., Pate v. Robinson, 383 U.S. 375, 377, 385, S. Ct. 836, 15 L. Ed. 2d 815 (1966); Odle v. Woodford, 238 F.3d 1084, 1087 (9th Cir. 2001); Johnson v. Norton, 249 F.3d 20, 26 (1st Cir. 2001); Weisberg v. Minnesota, 29 F.3d 1271, 1275-76 (8th Cir. 1994).

The issue in this case is not, as the State contends, whether the trial court abused its discretion in finding Brazee competent. BOR at 25. The State confuses procedural due process claims and substantive due process claims in relation to competency.

Competency claims are based either upon substantive due process or procedural due process. Barnett v. Hargett, 174 F.3d 1128, 1133 (10th Cir. 1999). "A competency claim based upon substantive due process involves a defendant's constitutional right not to be tried while incompetent." Id. "A competency claim based upon procedural due process involves a defendant's constitutional right, once a bona fide doubt has been raised as to competency, to an adequate state procedure to insure that he is in fact competent to stand trial." Id. at 1133-34. Brazee's procedural due process right is at issue here. Brazee need not establish he was incompetent to stand trial to obtain relief; rather he need only

establish the trial judge should have ordered a hearing to determine his competency. Roberts v. Dretke, 381 F.3d 491, 497 (5th Cir. 2004).

The State claims a trial court need only employ "some procedure" for the purpose of further inquiry rather than hold a formal evidentiary hearing after finding reason to doubt competency. BOR at 21-23. In support of this dubious proposition, the State claims Pate does not stand for the proposition that the trial court must conduct a competency hearing when there is reason to doubt competency. BOR at 21-22.

Pate held the trial court's failure to hold a hearing violated due process because the evidence before the trial judge was sufficient to raise a genuine doubt regarding competency. Pate, 383 U.S. at 385. In an attempt to counter Pate, the State cites Drope v. Missouri, 420 U.S. 162, 172, 95 S. Ct. 896, 904, 43 L. Ed.2d 103 (1975), which stated "The [Pate] Court did not hold that the procedure prescribed by Ill. Rev. Stat., c. 38, s 104-2 (1963), was constitutionally mandated, although central to its discussion was the conclusion that the statutory procedure, if followed, was constitutionally adequate." In Medina v. California, 505 U.S. 437, 449, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992), the United States Supreme Court ignored the Drope characterization in accurately describing the Pate holding as "a defendant whose competence is in doubt

cannot be deemed to have waived his right to a competency hearing."² The State is otherwise unable to point to a single case that has rejected the proposition that a trial court is constitutionally required to hold a competency hearing once there is reason to doubt competency. Once the trial court makes a threshold determination that there is "reason to doubt" the defendant's competency pursuant to RCW 10.77.060, the court must order a formal hearing to determine competency before proceeding to trial. State v. Marshall, 144 Wn.2d 266, 278, 27 P.3d 192 (2001); State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991).

The State claims a hearing was not needed because "there is nothing in the record to suggest that defendant's competency throughout the remainder of the trial was ever in doubt." BOR at 26. But "once a doubt about the competency of an accused exists, later behavior cannot be relied upon to dispense with a hearing." Griffin v. Lockhart, 935 F.2d 926, 931 (8th Cir. 1991) (citation and internal quotation marks omitted); see also Pate, 383 U.S. at 386 ("While [a defendant's] demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue.").

² The State cites Medina for another proposition but does not mention its description of the Pate holding. BOR at 22-23.

While acknowledging cases cited by Brazee show the need for a competency hearing, the State asserts that a "hearing" only means some form of "inquiry" rather than an evidentiary hearing on the issue. BOR at 23. "A 'hearing' is generally understood to be a proceeding where evidence is taken to the end of determining an issue of fact and a decision made on the basis of that evidence." People v. Pennington, 66 Cal. 2d 508, 521, 426 P.2d 942, 58 Cal. Rptr. 374 (Cal. 1967). Pate envisions this type of "full" hearing on the matter. Id.

Due process requires the trial court to make findings of fact and conclusions of law after an evidentiary hearing on the matter of competency. State v. Israel, 19 Wn. App. 773, 776-78, 577 P.2d 631 (1978);³ see also State v. Brooks, 16 Wn. App. 535, 538, 557 P.2d 362 (1977) (trial court substantially complied with the purpose and intent of RCW 10.77.060 because defendant received "a full competency hearing" consisting of testimony presented by two experts of the defendant's own choosing). The State does not address Israel. The State concedes no hearing on the record took place. BOR at 25. The mere signing of an order upon presentation cannot substitute for a hearing on the matter.

³ Israel is no longer be good law to the extent it holds an "informal" evidentiary hearing is sufficient to satisfy due process, given the Supreme Court's pronouncement that a "formal" hearing is required. Israel, 19 Wn. App. at 776; Marshall, 144 Wn.2d at 278.

In People v. Thompson, the parties stipulated to the findings of the two doctors contained in the competency reports and to their conclusion that the defendant, who had previously been declared unfit, was fit to stand trial. People v. Thompson, 158 Ill. App. 3d 860, 864-65, 511 N.E.2d 993 (Ill. App. 1987). The hearing failed to meet minimal due process standards necessary to find the defendant fit to stand trial because the trial judge wrongly relied on the stipulation to determine competence and did not exercise its discretion in ruling on the issue:

It does not appear from the record that the trial court even reviewed the reports that the parties were stipulating to. Although not dispositive, the trial court did not question the defendant, who was present at the fitness hearing, about his opinion as to his fitness to stand trial. The trial judge also failed to question the attorneys regarding the reports that they were stipulating to. The court should not be passive, but active in making the assessment as to fitness which the law requires.

Id.

Here, Judge Grant failed to question the attorneys about the competency report and failed to question Brazee about anything. There was no inquiry; only a rote acceptance of the competency report conclusion. The judge who entered the order finding Brazee competent was not even in the same judge who initially found reason to doubt competency.

In Griffin, the Eighth Circuit reversed conviction because the state trial court did not conduct a full, fair, and adequate hearing on the subject of the defendant's competency:

No witnesses were called; the only medical report on Griffin was the one paragraph letter from the mental health center; apparently no attempt was made to obtain a more complete report from the mental health center; and the trial court's questioning of Griffin was very limited. It is likely, in fact, that the state trial court did not even believe it was conducting a hearing, since it approved Griffin's request to withdraw his notice and motion putting in issue his competency.

Griffin, 935 F.2d at 931.

The circumstances here are similar. Judge Grant reviewed a written competency report, but hearing no testimony, she had no opportunity to assess the credibility of any witnesses, including the doctor who reported Brazee was competent. The trial judge in Griffin at least questioned the defendant to some extent before pronouncing him competent. Not only did Judge Grant fail to question Brazee at the time she determined his competency, the record does not show any verbal interaction between a trial judge and Brazee from the time Judge Nelson found reason to doubt competency through the time Judge Grant found him competent.

The determination of competency is a critical stage of the proceedings. Appel v. Horn, 250 F.3d 203, 215 (3d Cir. 2001); Sturgis v.

Goldsmith, 796 F.2d 1103, 1109 (9th Cir. 1986), cert. denied, 508 U.S. 918, 113 S. Ct. 2362, 124 L. Ed. 2d 269 (1993). Critical stages are those steps of a criminal proceeding that hold significant consequences for the accused. Bell v. Cone, 535 U.S. 685, 695-96, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). "For the defendant, the consequences of an erroneous determination of competence are dire" because he may be unable to exercise rights deemed essential to a fair trial. Cooper v. Oklahoma, 517 U.S. 348, 354, 364, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996).

It is therefore insufficient for the trial court to rest its entire competency determination on a psychiatric report. Taylor v. Horn, 504 F.3d 416, 433 (3rd Cir. 2007). Competency to stand trial is a legal concept, not a medical one. State v. Bertrand, 123 N.H. 719, 726, 465 A.2d 912 (N.H. 1983). Expert opinion that a defendant is competent is "merely evidence of competency." Id. For these reasons, "[t]rial judges must not be permitted to abdicate to psychiatrists their judicial responsibility to determine whether a criminal defendant is competent to stand trial." Id. The trial judge must still make an independent determination of competency even where a medical professional concludes a defendant is competent. Barnett, 174 F.3d at 1135; United States v. Makris, 535 F.2d 899, 908 (5th Cir. 1976); United States v. David, 511 F.2d 355, 360 n.9 (D.C. Cir. 1975). In Bertrand, conviction

was reversed because the existence of two psychiatric reports opining the defendant was competent did not satisfy the court's obligation to hold an evidentiary hearing on its own initiative. Bertrand, 123 N.H. at 725-26. By accepting the written competency report without conducting the necessary hearing to test its assertions, the court abandoned its ongoing duty to make an informed and independent decision regarding Brazee's competency.

The State claims the procedure employed to determine Brazee's competency was adequate in part because defense counsel did not request a hearing. BOR at 25-26. The person whose competency is in doubt cannot waive his right to have the court properly determine his capacity to stand trial. Pate, 383 U.S. at 384; State v. Smith, 88 Wn.2d 639, 642, 564 P.2d 1154 (1977), overruled on other grounds, State v. Jones, 99 Wn.2d 735, 744, 664 P.2d 1216 (1983). Defense counsel cannot waive the right to a competency hearing on behalf of a client whose competency is in doubt. Smith, 88 Wn.2d at 642 (citing In re Davis, 8 Cal. 3d 798, 808, 505 P.2d 1018, 106 Cal. Rptr. 178 (1973) (when a "doubt" arises in the mind of the trial judge regarding defendant's competence to stand trial, it becomes the judge's duty to certify the defendant for a hearing; the matter cannot be waived by defendant or his counsel); Kibert v. Peyton, 383 F.2d 566, 569 (4th Cir. 1967) ("The Supreme Court has held categorically that

the defense of incompetency to stand trial cannot be waived by the incompetent, Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966), and it ineluctably follows that his counsel cannot waive it for him by failing to move for examination of his competency.")).

Counsel's opinion about his client's competency and ability to assist in the defense should be considered in determining competency. Israel, 19 Wn. App. at 779. But parties cannot simply stipulate to competency. People v. Lewis, 103 Ill. 2d 111, 114-16, 468 N.E.2d 1222 (Ill. 1984) (holding trial court did not err in accepting stipulation to evidence of competence, as opposed to accepting stipulation to competence itself). "[C]ounsel is not a trained mental health professional, and his failure to raise petitioner's competence does not establish that petitioner was competent. Nor, of course, does it mean that petitioner waived his right to a competency hearing." Odle, 238 F.3d at 1088-89. Brazee's due process right to an evidentiary hearing therefore remained intact despite defense counsel's failure to request one, as it was incumbent upon the court to conduct a formal hearing on its own motion. Pate, 383 U.S. at 385; see also People v. Johnson, 15 Ill. App. 3d 680, 686, 304 N.E.2d 688 (Ill. App. Ct. 1973) ("to accept defendant's opinion, and that of his counsel by stipulation, that he was able to cooperate with counsel in his defense, when the purpose of a competency hearing in defendant's

behalf was to determine that very fact, would be to make a sham out of the restoration hearing.").

B. CONCLUSION

For the reasons Set forth above and in the opening brief, this Court should reverse Brazee's convictions and remand for a new trial.

DATED this 1st day of April, 2009.

Respectfully Submitted,

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STATE OF WASHINGTON
2009 APR -1 PM 4:26

STATE OF WASHINGTON)
Respondent,)
vs.) COA NO. 36979-6-II
ALAN BRAZEE,)
Appellant.)

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 1ST DAY OF APRIL 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 1ST DAY OF APRIL 2009.

x Patrick Mayovsky