

NO. 42036-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

XAVIER MAGANA,

Appellant.

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

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

The Honorable Frank E. Cuthbertson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Denial of appellant's motion to withdraw his guilty plea without a formal competency hearing denied appellant due process.

Issue pertaining to assignment of error

Appellant pleaded guilty under an agreement with the State to one count of first degree murder. Before he was sentenced, appellant moved to withdraw his plea, stating that he was not competent when he entered it due to his mental health condition and several personal crises. A forensic psychological evaluation detailed appellant's mental health diagnoses. With evidence before the court that called appellant's competency into question, did the court's failure to grant the motion to withdraw or hold a formal competency hearing deny appellant due process?

B. STATEMENT OF THE CASE

On July 13, 2009, the Pierce County Prosecuting Attorney charged appellant Xavier Magana with first degree murder and second degree unlawful possession of a firearm. CP 1-2; RCW 9A.32.030(1)(a); RCW 9.41.040(2)(a)(i). In April 2010, the information was amended, adding allegations of aggravating factors as to each offense. CP 9-10. In February 2011, the State amended the information again, dismissing the

aggravating factor allegations and the firearm charge in exchange for Magana's agreement to plead guilty. CP 20; 1RP¹ 2.

At a hearing before the Honorable Frank E. Cuthbertson on Magana's change of plea, the court asked Magana whether he had spoken to defense counsel about the plea, whether he understood the rights he was waiving, whether it was his decision to plead guilty, and whether he understood the standard range and maximum sentences. Magana answered "yes" to each of these questions. 1RP 4-6. The court also asked Magana if anyone had forced him to enter the plea against his will, and Magana answered "no." 1RP 4. Magana then acknowledged that the *Alford* statement in the plea agreement was his and said that he was pleading guilty. 1RP 6. The court accepted the plea. 1RP 6-7.

Defense counsel prepared a sentencing memorandum in support of the negotiated low-end standard range sentence. CP 46-114. Attached to the memorandum was a forensic psychological evaluation conducted at the request of the defense prior to the plea agreement to investigate a mental defense. CP 70-79; 2RP 4. The evaluation, conducted by Mark Whitehill, Ph.D., a licensed psychologist, and Richard MacLeod, MSW, a licensed independent social worker, involved six hours of direct contact

¹ The Verbatim Report of Proceedings is contained in two volumes, designated as follows: 1RP—2/09/11, 2RP—3/25/11.

with Magana, a battery of psychological tests, and review of discovery materials. CP 70, 79.

The report from the forensic psychological evaluation, prepared on January 21, 2011, detailed the official version of the offense and Magana's version; Magana's family, social, educational, occupational, substance abuse and mental health background; observations of Magana's behavior and mental status; and the psychological test results. CP 70-77. Based on all this information, the evaluators concluded that Magana experiences several severe mental health conditions, including post traumatic stress disorder and severe major depression. While these conditions did not render him legally insane, they did affect his capacity so that he was unable to form the mental element of premeditated intent necessary to commit first degree murder. CP 78-79.

Before Magana was sentenced at a hearing in March 2011, defense counsel presented to the court a written statement from Magana in which he asked to withdraw his guilty plea. 2RP 3. In the statement Magana said he did not believe he was competent to fully understand the proceedings at the time he entered his guilty plea. He told the court that his father had passed away in January, and he had not been able to control his emotions or think clearly. In addition, his sister and mother were talking about leaving the state, and his wife had also told him she was

leaving and taking their children. Due to these circumstances, he had not felt like his life mattered, and that contributed to him not thinking clearly. Magana said he would not have signed his life away in a plea agreement if he was competent and clear minded. CP 116. He also noted that his mental health conditions had not been addressed with medication. CP 117.

Magana further indicated that he believed his attorney was not working toward his best interests and was responsible for persuading him to accept the plea agreement. Magana felt he was taken advantage of, saying his attorney told him that the plea agreement was his only chance to ever see freedom again, and that when he did not agree to the plea deal immediately, his attorney got mad. Magana then reminded the court that when he was presented with a similar plea offer in November 2009, he did not accept it. CP 116.

Magana asked the court to take his statement into consideration and allow him to withdraw his guilty plea and undergo a competency evaluation. He also expressed the desire to file a motion alleging ineffective assistance of counsel. CP 117.

After presenting this statement to the court, defense counsel asked the court to set the sentencing over for an evaluation of Magana's competency. 2RP 3. Counsel noted that Magana had been diagnosed with

major depression in the forensic psychological evaluation, and Magana said in his statement that his untreated depression was affecting his judgment. Counsel argued that given the magnitude of the charge in this case, it was appropriate to determine whether there was a basis to withdraw the plea. 2RP 3-4.

The State responded that it was ready to proceed with sentencing. It acknowledged, however, that a full hearing on Magana's motion to withdraw his plea may be required. 2RP 5.

The court noted that it had reviewed the colloquy from the plea hearing and that Magana had denied being forced to enter the plea. After the entire colloquy, it had found Magana was competent and that the plea was knowing, intelligent and voluntary, and based on a reduction in charges. 2RP 7. The court did not believe that anything in Magana's statement demonstrated a manifest injustice. It was also concerned that the victim's family was present and ready to proceed with sentencing. 2RP 7. After taking a brief recess to look at its notes, the court denied Magana's motion for a competency hearing and to withdraw his plea. 2RP 8. The court said there was no showing of a manifest injustice, no showing the plea was involuntary or coerced, and no showing that counsel was ineffective. Because the public interest supports the enforcement of

plea agreements, the court ruled it would proceed with sentencing. 2RP 8-9.

Despite the joint recommendation for a low-end sentence, the court imposed a sentence at the top of the standard range. 2RP 23; CP 39. Magana filed this timely appeal. CP 118.

C. ARGUMENT

BECAUSE THERE WAS EVIDENCE CALLING MAGANA'S COMPETENCY INTO QUESTION, THE TRIAL COURT VIOLATED MAGANA'S RIGHT TO DUE PROCESS BY DENYING HIS MOTION TO WITHDRAW HIS GUILTY PLEA WITHOUT HOLDING A COMPETENCY HEARING.

A trial court must allow a defendant to withdraw a guilty plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f); State v. Marshall, 144 Wn.2d 266, 280-81, 27 P.3d 192 (2001); State v. DeClue, 157 Wn. App. 787, 792, 239 P.3d 377 (2010). A manifest injustice exists where the guilty plea was involuntary. Marshall, 144 Wn.2d at 281; DeClue, 157 Wn. App. at 792. A defendant's claim that he lacked the competence to enter a guilty plea is a claim that the plea was involuntary. Marshall, 144 Wn.2d at 281.

"Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel." Godinez v. Moran, 509 U.S. 389, 402,

113 S.Ct. 2680, 125 L.Ed.2d 321 (1993). Under RCW 10.77.060², a formal competency hearing is required whenever there is reason to doubt the defendant's competence. Marshall, 144 Wn.2d at 279. The procedures set forth under the statute are mandatory, not merely directory. Marshall, 144 Wn.2d at 279 (citing In re Personal Restraint of Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001)).

In Marshall, the defendant pleaded guilty against the advice of counsel to aggravated first degree murder. At the plea hearing the court engaged in a summary colloquy with Marshall, asking about his understanding of the plea, his rights, and the consequences of his decision. Most of the court's questions could be answered yes or no. The court concluded Marshall was competent and accepted his plea. Marshall, 144 Wn.2d at 269-70.

Three years later Marshall moved to withdraw his plea, claiming he was not mentally competent at the time it was entered. At a hearing on this motion, Marshall presented undisputed evidence that he suffered significant brain damage that affected his ability to make decisions, bipolar disorder which adversely affected his ability to think, reason, and

² "Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant." RCW 10.77.060(1)(a).

control himself, and auditory hallucinations as a result of his paranoid schizophrenia. Marshall, 144 Wn.2d at 270-72. The trial court found there was clearly brain atrophy causing impairment but nonetheless denied Marshall's motion to withdraw his guilty plea. The court based its decision that Marshall was competent to enter the plea on its observations of Marshall's demeanor and responses at the plea hearing. Marshall, 144 Wn.2d at 273.

On review, the Supreme Court addressed the question of whether the trial court's denial of Marshall's motion to withdraw was proper in light of evidence that raised a doubt as to Marshall's competency. Marshall, 144 Wn.2d at 279. The Court noted that, while there was ample evidence before the trial court to call Marshall's competency into question, the trial court discounted that evidence. Without the benefit of a competency hearing, the trial court determined that Marshall was competent at the time he entered his plea, relying on its own observations and the observations of others who interacted with Marshall. The Supreme Court found this to be an abuse of discretion. Marshall, 144 Wn.2d at 279-80.

The Court held that "where a defendant moves to withdraw [a] guilty plea with evidence the defendant was incompetent when the plea was made, the trial court must either grant the motion to withdraw [the]

guilty plea or convene a formal competency hearing required by RCW 10.77.060.” Marshall, 144 Wn.2d at 281. Because the trial court neither granted the motion to withdraw nor ordered a competency hearing, despite substantial evidence of Marshall’s incompetence, the Supreme Court vacated Marshall’s guilty plea and remanded. Marshall, 144 Wn.2d at 281-82.

Here, as in Marshall, the trial court accepted Magana’s guilty plea after a summary colloquy in which Magana answered “yes” or “no” to the court’s questions. 1RP 4-6. Before sentencing, Magana moved to withdraw his plea, explaining that his emotional state resulting from personal crises around the time of his plea, as well as his mental illness, prevented him from fully understanding the nature and consequences of the plea. CP 116-17. In addition, the defense presented evidence from psychological experts that Magana suffered from severe post traumatic stress disorder and depression which could affect his ability to form intent. CP 70-79. This undisputed evidence called Magana’s competency to enter a guilty plea into question.

The psychological evaluation indicated that because of Magana’s mental illnesses, stressors could trigger a panic reaction during which he is unable to act with deliberation. CP 78-79. In Magana’s statement, he explained that just before the plea was entered his father died, his sister

and mother told him they were planning to leave the state, and his wife said she was leaving him with their children. Magana no longer felt that his life was worth living, and he was not able to think clearly. CP 116. In light of the psychological findings and Magana's personal crises, it is not unreasonable that Magana felt pressured by defense counsel's manner of presenting the plea agreement to him. This evidence raises a question as to whether Magana agreed to the plea as a panic reaction, rather than making a knowing, intelligent and voluntary decision. At the very least a formal competency hearing was required.

By contrast, in DeClue, the defendant presented no credible evidence raising a question as to his competence to plead guilty. DeClue, 157 Wn. App. at 796. In that case, the defendant moved to withdraw his plea, arguing that he was incompetent when it was entered because he was under the influence of several prescription medications. DeClue, 157 Wn. App. at 790. At an evidentiary hearing, DeClue presented testimony that his medications made him drowsy and impaired his ability to concentrate. DeClue, 157 Wn. App. at 790-91. Other witnesses testified, however, that although DeClue was taking medication, he never seemed intoxicated or impaired, and he was able to discuss his case and negotiate the plea agreement. DeClue, 157 Wn. App. at 791. The trial court also reviewed the video tape of the plea hearing and found DeClue lucid and unaffected

by his medications. DeClue, 157 Wn. App. at 791. The trial court did not find the defense witnesses persuasive. Because DeClue presented no credible evidence that his medications affected his ability to understand the consequences of pleading guilty, he did not demonstrate a manifest injustice, and the trial court properly denied the motion to withdraw his plea. DeClue, 157 Wn. App. at 795-96.

In this case the trial court also denied the motion to withdraw after reviewing its notes from the plea hearing. But because the evidence of incompetence was significantly different in this case than in DeClue, the trial court's observations were not sufficient to resolve the question of competency. The contention in DeClue was that the defendant's medications rendered him zombie-like, dazed, and drowsy, with the implication that he could not voluntarily waive his constitutional rights in that condition. DeClue, 157 Wn. App. at 790-91. The trial court determined that there was no credible evidence to support the contention that his medications had that effect, and the court's observations at the plea hearing were relevant to that determination. Here, on the other hand, there was undisputed evidence that Magana suffered from severe mental health conditions which could affect his ability to understand the nature or consequences of a guilty plea. Magana also described his personal circumstances which, together with his mental health diagnoses, he

claimed affected his competency. As was the case in Marshall, the trial court could not resolve the question of competency by relying on its own observations at the plea hearing. See Marshall, 144 Wn.2d at 280.

Because the undisputed evidence raised a legitimate question as to Magana's competency to enter a guilty plea, the court was required to either grant his motion to withdraw the plea or order a formal competency hearing. See Marshall, 144 Wn.2d at 281. Instead, the court discounted the evidence and relied on its own observations of Magana during the plea hearing to determine that Magana was competent. 2RP 7-9. This error by the trial court violated Magana's right to due process. See Fleming, 142 Wn.2d at 863 (failure to observe procedures to ensure competency results in denial of due process). Magana's guilty plea must be vacated and the case remanded for further proceedings. See Marshall, 144 Wn.2d at 282.

D. CONCLUSION

By denying Magana's motion to withdraw his guilty plea without a formal competency hearing, the trial court denied Magana due process, and Magana's guilty plea must be vacated.

DATED this 19th day of August, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Catherine E. Glinski', written over a horizontal line.

CATHERINE E. GLINSKI

WSBA No. 20260

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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Xavier Michael Magana*, Cause No. 42036-8-II, directed to:

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



Catherine E. Glinski
Done in Port Orchard, WA
August 19, 2011

11 AUG 22 AM 10:10
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BY _____
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DIVISION II