

NO. 42036-8

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

STATE OF WASHINGTON, RESPONDENT

v.

XAVIER MAGANA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan
The Honorable Frank E. Cuthbertson

No. 09-1-03325-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion in denying defendant's motion to withdraw his guilty plea without holding a competency hearing when defendant presented no evidence to support his assertion that he was incompetent at the time of his plea and the information otherwise available to the court did not support his claim?

B. STATEMENT OF THE CASE.

On July 13, 2009, the Pierce County Prosecutor's Office filed an information charging appellant, Xavier Magana ("defendant"), with murder in the first degree and unlawful possession of a firearm. CP 1-2, 137-138. The information was later amended to allege some aggravating circumstances on each count. CP 9-10.

On April 10, the parties were before the court as defendant was seeking substitution of counsel; defendant thought his attorney was not keeping in sufficient contact with him and was not working in his best

interests. 4/21/10 RP 3-5.¹ Defendant had previously written a letter to the court indicating his dissatisfaction with counsel. CP 6-8. Defendant articulated clearly his reasons for believing his attorney's performance was deficient and showed an understanding that the judge had the power to replace his attorney. 4/21/10 RP 4-5. There is nothing in his letter or the verbatim report of proceedings from this hearing that would raise a concern of question about defendant's competency; defendant showed a clear understanding of the proceedings he faced. 4/21/10 RP 3-6; CP 6-8. The court denied the motion to substitute counsel. 4/21/10 RP 7

On February 9, 2011, the parties were back before the court, as the prosecutor was willing to file a second amended information, dismissing the enhancements on count I and dismissing the unlawful possession of firearm charge entirely, in exchange for the defendant's plea of guilty. 2/9/11 RP 2; CP 20, 21. Defendant and his attorney presented the court with a completed statement of defendant on plea of guilty. CP 22-30. The court proceeded to ask defendant about his understanding of the consequences of entering a guilty plea and its voluntary nature. 2/9/11 RP 4-6. Specifically the court inquired:

¹ There are two bound volumes of transcripts in the record of review. One contains the hearing that occurred on April 21, 2010 and shall be referred to as "4/21/10 RP." The other volume contains the report of proceedings for the taking of the plea on February 9, 2011, and the motion to withdraw plea/sentencing hearing that occurred on March 25, 2011. These hearings are paginated separately so that this single volume contains two pages for each of the numbers 1 through 9. In order to avoid confusion, the State will include the date of the hearing prior to the "RP" reference.

COURT: ...Has anyone done anything to force you to enter this plea against your will?

DEFENDANT: No.

COURT: Okay. So it's your decision to plead guilty?

DEFENDANT: Yes.

2/9/11 RP 4. After the court completed its colloquy, it accepted defendant's guilty plea and set a date for sentencing. 2/9/11 RP 6-7. Up to this point in the history of defendant's case, neither the prosecution nor the defense ever moved the court for a competency evaluation; there is nothing in the record on review to indicate that there was ever any concern about the defendant's competency to stand trial or enter a guilty plea.

The case was back before the court for sentencing on March 25, 2011. 3/25/11 RP 2. At that time defense counsel indicated that defendant wanted to withdraw his plea; counsel handed a statement, drafted by the defendant, to the court and represented that his client felt that he was not competent at the time he entered his plea. 3/25/11 RP 3; CP 115-117. The handwritten statement asserts that, at the time of the plea, the defendant was not thinking clearly due to his father's death in January and indications from his wife, mother, and sister that they may be leaving the state. CP 115-117. Defendant also indicated that he felt pressured by his attorney to plead guilty. *Id.* In the letter, defendant averred that "I am also believed to be Bi-Polar [sic] and have depression, which I have not been properly tested for; and so I do not have the proper

medications to allow me to think clearly and act as a normal person should.” *Id.* He concluded his statement by asking the court to allow him to withdraw his guilty plea and to undergo a competency hearing. *Id.* At the hearing, no one moved for a competency evaluation at Western State Hospital; defense counsel did ask for a continuance of the hearing date so that another attorney could meet with the defendant about his claim and “perhaps a psychologist, meet with him to determine whether or not there’s a basis to withdraw his plea. 3/25/11 RP 3-4.

Also before the court at this time was information from the defense sentencing memorandum regarding a forensic psychological evaluation that had been done on defendant prior to his entry of guilty plea. CP 46-114. The memorandum included the following:

A psychological evaluation of [defendant] was done by Mark Whitehill, Ph.D. to determine whether he had a valid mental health defense to the charge of Murder 1. Based on the various testing done, interviews with [defendant] and a review of discovery [defendant] was diagnosed with post-traumatic stress disorder (PTSD), chronic and major depression.

CP 51. Dr. Whitehill’s psychological report was filed as an attachment to this sentencing memorandum; it included the following information:

[Defendant] denied psychiatric admission, use of psychoactive agents and involvement in mental health counseling. He stated that he does not have a history of mental health problems and does not want to be on medication like his parents and brother. [Defendant] reported that they are all being treated for mood disorders,

his mother and brother for bipolar disorder and his father for depression.

CP 76. Dr. Whitehill's evaluation was based upon four meetings with the defendant over a four month period of time - from August 2010 through December 2010. CP 70. The report describes defendant as "consistently alert and oriented to person, place, date and situation." CP 76. These interactions revealed "[n]o deficits in cognitive intactness." *Id.* The report went on to describe that defendant "did not evidence gross functional psychopathology, though he appeared mildly depressed and notably anxious" and that he "voiced no delusional material or paranoia, and there was nothing in his verbal production suggestive of memory concentration or organic impairment." *Id.* Nothing in the psychological assessment raises any concern about the defendant's competency. CP 70-79. The court referenced having read this material prior to ruling on the defendant's motion to withdraw. 3/25/11 RP 6-7.

The court also referenced the plea colloquy and how when asked whether anyone one had forced him to enter the plea against his will, the defendant denied any such influence and averred that the decision to plead guilty was his own. 3/25/11 RP 6-7. The court indicated that nothing in defendant's written statement seeking withdrawal made a "threshold showing" of a manifest injustice such as an involuntary plea or ineffective assistance of counsel. 3/25/11 RP 7. Prior to making its final ruling on the motion to withdraw, the court took a recess to review its notes.

3/25/11 RP 8. After reviewing it notes, the court denied “defendant’s motion to set over sentencing and to withdraw his guilty plea” finding defendant had failed to meet his burden of showing a manifest injustice. 3/25/11 RP 8.

The court then proceeded to sentencing. After hearing from the parties, the court imposed a high end standard range sentence of 333 months confinement and 36 months of community custody, indicated restitution would be set at a restitution hearing, ordered payment of \$2,200 in legal financial obligations and entered a no contact order with the victim’s family. 3/25/11 RP 22-24.

Defendant entered a timely notice of appeal from entry of the judgment. CP 118-131.

C. ARGUMENT.

1. THE COURT PROPERLY DENIED DEFNDANT’S MOTION TO WITHDRAW HIS PLEA WITHOUT HOLDING A COMPETENCY HEARING WHEN DEFENDANT FAILED TO PRESENT ANY EVIDENCE TO SUPPORT HIS CLAIM THAT HE WAS INCOMPETENT AT THE TIME OF HIS PLEA AND THE COURT HAD NO OTHER INFORMATION TO INDICATE A CONCERN ABOUT HIS COMPETENCY.

When a defendant claims that he was incompetent to plead guilty, it is the same as claiming that the plea was involuntary. *State v. Marshall*, 144 Wn.2d 266, 281, 27 P.3d 192 (2001). The competency standard for

pleading guilty is the same as that for standing trial. *Marshall*, 144 Wn.2d at 281. A criminal defendant is not competent to be tried if he or she is incapable of properly appreciating the nature of the charges and their consequences, and of rationally assisting in the defense. *Marshall*, 144 Wn.2d at 278. The issue of a criminal defendant's competency is a mixed question of law and fact. *Id.* at 281. When a defendant claims that he was incompetent to plead guilty, the court reviews "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *State v. Calvert*, 79 Wn. App. 569, 576, 903 P.2d 1003 (1995) (quoting *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)).

A formal competency hearing is required "whenever a legitimate question of competency arises." *Marshall*, 144 Wn.2d at 279, 27 P.3d 192. A legitimate question of competency arises when a defendant moves to withdraw a guilty plea and supports the motion with "substantial evidence" of incompetency. *See Marshall*, 144 Wn.2d at 281, 27 P.3d 192. A court that is presented with substantial evidence of the defendant's incompetency at the time of the plea, must either grant the motion to withdraw or hold a competency hearing. *Marshall*, 144 Wn.2d at 281. In *Marshall*, the Supreme Court vacated the defendant's guilty plea because he presented "substantial evidence calling [his] competency into question." *Marshall*, 144 Wn.2d at 281. Undisputed evidence showed that Marshall had suffered brain damage and had bipolar mood disorder or

manic depressive disorder. He was also diagnosed as paranoid schizophrenic a few weeks before entering his plea. *Marshall*, 144 Wn.2d at 279-80.

In contrast, an incompetency claim that is unsupported by evidence may be rejected without the need for a competency hearing. *State v. Hystad*, 36 Wn. App. 42, 45, 671 P.2d 793 (1983) (rejecting an unsupported claim that a defendant's plea was involuntary because of methadone-induced confusion); *see also State v. Calvert*, 79 Wn. App. at 576 (rejecting unsupported incompetency claim based on a head injury); *State v. Armstead*, 13 Wn. App. 59, 63-65, 533 P.2d 147 (1975) (rejecting defendant's unsupported claim that he was "drunk off barbiturates" when he pleaded guilty); *State v. De Clue*, 157 Wn. App. 787, 239 P.3d 377 (2010) (evidence that defendant was on medication and appeared in a daze to relatives was insufficient when court reviewed the plea hearing and saw no indication of incompetency and when defendant's attorney testified that he never had difficulty communicating with him and that defendant participating in formulating the terms of the plea agreement).

A trial court is vested with broad discretion in determining whether a competency examination should be ordered. *State v. Osborne*, 102 Wn.2d 87, 98, 684 P.2d 683 (1984); *State v. Lord*, 117 Wn.2d 829, 901, 822 P.2d 177 (1991). The facts that 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. *In re Fleming*, 142 Wn.2d 853, 863, 16 P.3d 610 (2001). If the trial court is not provided with sufficient information regarding the defendant's competency, or there is no reason for the trial judge to doubt the defendant's competency, the court does not abuse its discretion by declining to order a mental examination and convene a hearing. *Id.* at 863-864. The trial court's determination of competence to stand trial is a matter within its discretion, reversible only upon a showing of abuse of that discretion. *State v. Benn*, 120 Wn.2d 631, 662, 845 P.2d 289, *cert. denied*, 510 U.S. 944, 114 S. Ct. 3825, 126 L. Ed. 2d 331 (1993). Deference is given to the trial court's determination because of the court's opportunity to observe the defendant's behavior and demeanor. *State v. Hicks*, 41 Wn. App. 303, 305, 704 P.2d 1206 (1985).

In the case before the court, no concern was raised about the defendant's competency until the defendant raised it post plea. The evidence he offered to support his claim was his own, unsworn, statement claiming that he wasn't "thinking clearly" at the time of his plea and that he was "believed to be Bi-Polar and have depression." CP 115-117. Also before the court was a psychological evaluation that confirmed the depression but gave no support to defendant's claim of being bipolar. CP 70-79. The psychological evaluation provided no information that would cause the court to question the defendant's competency to stand trial. *Id.* The defendant's handwritten statement to the court was cogent and neatly

written; it clearly demonstrated that the defendant understood that: 1) his attorney was supposed to act in his best interest; 2) serious consequences flowed as a result of his guilty plea; and 3) the court had the power to grant him relief from those consequences. *Id.* The content of the letter did not indicate any lack of competency, but showed the defendant clearly understood the situation in which he stood. The defendant had written an earlier letter to the court, in April 2010, that also showed an understanding of the proceedings and the function his attorney and the court performed in those proceedings. CP 6-8. Finally, the court had its own recollections of the taking of the plea and took the extra step of reviewing its notes of that plea before ruling on the motion. 3/25/11 RP 6-7, 8. The court noted that defendant was now trying to deny that it had been his decision to plead guilty when he had affirmatively assured the court that it was his decision at the time of the plea. 3/25/11 RP 6-7. The court also noted that defendant had received a significant benefit under the terms of the plea agreement which supports a finding that entering the plea was a reasonable choice to make under the circumstances. 3/25/11 RP 7. The court noted that defendant's letter failed to make "a threshold showing" of the challenges he was now raising. 3/25/11 RP 7. Ultimately the court denied the motion to withdraw because the defendant had made "no showing that [defendant's] plea was in any way involuntary or was coerced." 3/25/11 RP 8-9.

This record does not show any legal error in denying the motion without holding a competency hearing as defendant failed to present *any* evidence that he was incompetent at the time of the plea, much less the “substantial showing” needed to trigger the necessity of holding such a hearing. Based upon the court’s own dealings with the defendant, the fact that his attorney had never shown any concern about defendant’s competency, and the report of the psychological evaluation done on the defendant, the trial court did not abuse its discretion in denying defendant motion to withdraw without a competency hearing. This ruling should be upheld.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the ruling denying the motion to withdraw plea when defendant failed to present substantial evidence that he was incompetent at the time of his plea.

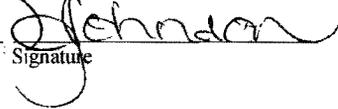
DATED: November 15, 2011

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