

**NO. 44826-2**

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

STATE OF WASHINGTON, RESPONDENT

v.

BRYAN WINDMEYER, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Frank Cuthbertson

No. 12-1-01499-1

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**BRIEF OF RESPONDENT**

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

1. Should this Court affirm the trial court's order assessing financial responsibility for the cost of Windmeyer's competency evaluation to DSHS when the Legislature placed responsibility for such costs on DSHS under the provisions of RCW 10.77?

B. STATEMENT OF THE CASE.

On April 27, 2012, the Pierce County Prosecuting Attorney's Office filed an information charging Bryan Windmeyer with assault in the first degree, unlawful possession of a firearm in the first degree, felony harassment, unlawful possession of a stolen vehicle and vehicle prowling in the second degree. CP 1-3.

In the course of this prosecution, a concern arose about Windmeyer's competency to stand trial. The court signed an order committing him to Western State Hospital (WSH) for an evaluation. CP 8-9.<sup>1</sup> The order also indicated that Windmeyer "may be developmentally

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<sup>1</sup> The initial order was entered on September 7, 2012, but the court failed to check a box indicating that the evaluation was to occur at WSH. CP 4-7. A corrected order was entered on September 18, 2012. CP 8-9.

disabled," thereby triggering the provisions of RCW 10.77.060(1)(b) that the evaluation be done by a "developmentally disabled professional" (DDP). *Id.*

The matter came back before the court when it was learned that WSH did not have a qualified evaluator on staff who met both of the criteria found in RCW 10.77.060(1)(a) and (b) - specifically a DDP who was "approved by the prosecuting attorney." Apparently WSH had only one DDP on staff, Dr. Hendrickson, but he was not approved by the prosecution. CP 25-26; 3/1/13 RP 2-3. After a delay of 70 days during which Western State Hospital failed to provide a substitute qualified professional, the court, pursuant to the authority of RCW 10.77.060(1), signed an order appointing an expert, Dr. Brent O'Neal, who did meet these criteria to conduct the evaluation. CP 10-14. After Dr. O'Neal submitted his report, the court found Windmeyer competent to stand trial. CP 15-16.

The issue arose as to who was responsible for paying Dr. O'Neal's bill for the evaluation. Windmeyer contended that he should not have to pay it because the court undertook to appoint a qualified professional to assess his competency to stand trial, and the prosecution contended that it should be the responsibility of WSH - or more precisely the department of social and health services (DSHS) who is responsible for WSH - as WSH

could not provide a qualified professional to conduct the exam when defendant was committed to its care. 3/1/13 RP 2-7. DSHS contended that the bill was the responsibility of Pierce County. 3/1/13 RP 3-7; CP 17-24. After hearing argument from all parties, the court took the matter under advisement. 3/1/13RP 6. It later issued a written order that DSHS should be responsible for the payment of the bill. CP 25-27. DSHS filed a notice of appeal from entry of this order. CP 40-46.

Following a determination that Windmeyer was competent to stand trial, he entered a plea of guilty to an amended information charging him with assault in the second degree, unlawful possession of firearm in the first degree, felony harassment, unlawful possession of a stolen vehicle, and vehicle prowling in the second degree. CP 47-59. He was sentenced to the department of corrections for a total term of confinement of 101 months. *Id.*

DSHS did not pay Dr. O'Neal's bill, but pursued its appeal. Two Pierce County agencies who are the respondents in this appeal -the Department of Assigned Counsel and the Prosecuting Attorney's Office - jointly paid the bill, then sought dismissal of the appeal as moot, which DSHS opposed. The Commissioner of the Court of Appeals, Division II denied the respondent's motion to dismiss the appeal.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING DSHS TO PAY THE COST OF WINDMEYER'S COMPETENCY EVALUATION.

There are constitutional and statutory protections against pursuing a criminal prosecution against a person who is not competent to stand trial.

*Drope v. Missouri*, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 378, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966); RCW 10.77.050 (“No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.”). The Washington Legislature enacted the procedures set forth in RCW 10.77 to direct a court as to what should be done when there is a concern about a criminal defendant's competency.

Specifically:

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 a qualified expert or professional person, who shall be approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant.

RCW 10.77.060(1)(a). If there is any concern that "the defendant may have a developmental disability, the evaluation must be performed by a developmental disabilities professional." RCW 10.77 060(1)(b).

While the statute allows the evaluation to be in a jail, detention facility or the community, it also permits the court to "commit the defendant for evaluation to a hospital or secure mental health facility without an assessment" if certain conditions are met. RCW 10.77.060(1)(d).

The Legislature empowered DSHS to fulfill its duties under the statute by authorization that the "secretary may execute such agreements as appropriate and necessary to implement this section and may choose to designate more than one evaluator." RCW 10.77.060(4). The Legislature made it clear that "[a]n expert or professional person obtained by an indigent person pursuant to the provisions of this chapter *shall be compensated for his or her services out of funds of the department*, in an amount determined by the secretary to be fair and reasonable. to paying for the cost of the competency evaluation." RCW 10.77.020 (emphasis added). Finally, and perhaps most importantly, the Legislature provided that:

The department shall be responsible *for all costs relating to the evaluation and treatment of persons committed to it pursuant to any provisions of this chapter*, and the logistical and supportive services pertaining thereto. Reimbursement may be obtained by the department pursuant to RCW 43.20B.330.

RCW 10.77.250 (emphasis added). In sum, throughout the provisions of 10.77, the Legislature has indicated that the cost of evaluations and the

experts obtained to conduct competency evaluations ordered pursuant to RCW 10.77 were to be paid by DSHS funds.

In the case now before the Court, Windmeyer was committed to WSH for an evaluation pursuant to RCW 10.77.060(1)(a). CP 8-9. Therefore, under RCW 10.77.250, DSHS was responsible for "all costs relating to the evaluation." Under the provision of RCW 10.77, the trial court did not err in holding DSHS financially responsible for the cost of the evaluation.

After the court committed Windmeyer to WSH for an evaluation, it became clear that WSH was unable to provide a qualified evaluator who met the criteria imposed by both RCW 10.77.060(1)(a) and (b) - specifically a DDP who was "approved by the prosecuting attorney". DSHS suggests that as it was the prosecutor who would not approve the WSH staff DDP, that this action should make the Prosecutor's Office financially responsible for the cost of the evaluation. *See* Appellant's Br. at p 14. In RCW 10.77.060(1)(a), the Legislature gave the prosecutor "approval" rights as to the evaluator.<sup>2</sup> The plain language of RCW

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<sup>2</sup> The version of RCW 10.77.060(1)(a) in effect at the time the court ordered Windmeyer's evaluation is set forth in the main part of the brief; it went into effect on May 1, 2012. The former RCW 10.77.060(1)(a) read, in the relevant part: "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." Laws of 2004 c 9 § 1. The Legislature has recently amended the provision to remove the requirement of two experts but not to eliminate the prosecutorial approval of the designated evaluator.

10.77.060(1)(a) directs DSHS to designate an qualified expert who is approved by the prosecuting attorney. DSHS cannot fulfill its obligation under the statute by designating an expert who is *not* approved by the prosecuting attorney. The prosecutor cannot be acting improperly by exercising a right given to it by the Legislature. Moreover, none of the provisions in RCW 10.77 holding DSHS responsible for the costs of a competency evaluation contain an exception for when the prosecuting attorney does not approve of the staff evaluator selected by WSH. There is no statutory support for DSHS's argument.

The Legislature also enacted provisions that allow DSHS to recoupment of cost. RCW 10.77.250. Further, case law holds that DSHS may also seek reimbursement of costs under RCW 10.01.160 if the person evaluated is ultimately convicted of a crime. *See Utter v. State of Washington and DSHS*, 140 Wn. App. 293, 165 P.3d 399 (2007). Thus DSHS is not without recourse.

Under the provision of RCW 10.77, the trial court did not err in holding DSHS responsible for the cost of Windmeyer's competency evaluation.

D. CONCLUSION.

For the foregoing reasons, this Court should affirm the trial court order.

DATED: February 12, 2014.

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Certificate of Service:

The undersigned certifies that on this day she delivered by US mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2-12-14 Theresa Hail  
Date Signature

# PIERCE COUNTY PROSECUTOR

## February 18, 2014 - 12:29 PM

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