

No. 290557

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October 10, 2011
Court of Appeals
Division III
State of Washington

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

LEWIS A. LAWRENCE, Appellant

APPEAL FROM THE SUPERIOR COURT
OF WHITMAN COUNTY

SUPPLEMENTAL BRIEF OF APPELLANT
on Rhome

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A. Issue Requested To Be Briefed

1. The Applicability Of The Washington Supreme Court's Holding In *Personal Restraint Petition of Demar Rhome*.

B. Statement Of The Case

The pertinent facts are set forth in Appellant's opening brief and the State's response brief. Additional facts are noted in the argument below.

C. Introduction

On September 21, 2011, this court directed the parties to file a supplemental brief addressing the applicability of *Personal Restraint Petition of Demar Rhome*, ---P.3d ----, 2011 WL 4089889 (2011).

In its preliminary review of the relevant authority, the *Rhome* court acknowledged the existing boundaries of self-representation and the overriding concern that a defendant be provided a fair trial:

“Insofar as a defendant's lack of a capacity [for self-representation] threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial.” *Rhome*, Slip Op. 6, quoting *Indiana v. Edwards*, 554 U.S. 164, 177, 129 S.Ct. 2379, 171 L.Ed.2d 345 (2008).

The foundational concern in the *Rhome* decision was balancing the circumscribed right to conduct a pro se defense by a defendant whose mental competence was questioned with both the appearance of fairness and the assurance of the constitutional right to due process. The Court found that already existing law provided for judges to be sensitive to mental health issues when considering granting a waiver, yet no constitutionally mandated standard exists beyond securing a knowing and intelligent waiver from a mentally ill defendant seeking self-representation. *Slip Op.* at 12.

The holding in *Rhome* does not resolve the issues in Mr. Lawrence's case on three grounds: First, while the procedural posture of *Rhome*, a personal restraint petition, did not allow the Court to announce a new rule concerning a mandatory competency analysis, such a rule is not precluded on Mr. Lawrence's direct appeal. Second, the acknowledged limitation on the right to self-representation based on *Kolocotronis*, *Edwards*, and *Hahn*¹, lends weight to the suggestion by the Court that a due process based rule requiring a more stringent waiver of counsel for a defendant whose competency has been questioned may be a better standard.

¹ *State v. Kolocotronis*, 73 Wn.2d 92, 436 P.2d 774 (1968); *State v. Hahn*, 106 Wn.2d 885, 726 P.2d 25 (1986).

Finally, because the lower court in Mr. Lawrence's case did not follow the statutory requirements of RCW 10.77.060(1)(a) and RCW 10.77.084(1)(b), and ultimately did not make a separate inquiry into the competency issue, the court abused its discretion in finding Mr. Lawrence was competent to stand trial and further, competent to waive counsel and conduct a defense pro se.

D. Argument

1. The *Rhome* Court's Unwillingness To Create A More Stringent Rule, Based On The Procedural Posture Of *Rhome*, Should Not Influence This Court's Willingness To Reach That Issue.

The *Rhome* court declined to consider crafting a due-process based rule requiring a more stringent waiver of counsel rule for a defendant whose competency was questioned because "even if adopted, *Rhome* cannot get the benefit of such a rule for the first time on a PRP." *Slip Op.* at 12,13. New constitutional rules of criminal procedure are not retroactively applied on collateral attack with two narrow exceptions. *Teague v. Lane*, 489 U.S. 288, 310, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). However, in a direct appeal, any new constitutional rule established by this court would apply to Mr. Lawrence.

2. A More Stringent Due-Process Based Rule Concerning Mental Competency To Act As One's Own Counsel Is

Necessary To Prevent Compromise of A Defendant's Right To A Fair Trial.

The *Rhome* court recognized the gap in the jurisprudence surrounding competency to stand trial and competency to appear pro se. *Slip Op.* at 16-17. Specifically, under current law the only requirement for the trial court is to secure a knowing and intelligent waiver from a mentally ill criminal defendant who seeks to waive counsel and proceed pro se. Acknowledging “[t]here may be room within the universe of *Edwards*, *Kolocotronis*, and *Hahn*, to craft a due-process based rule requiring a more stringent waiver of counsel for a defendant whose competency is questioned” the Court signaled its openness to a more demanding standard. *Slip Op.* at 12. The Court explained:

“It stands to reason that the *Hahn* court did not conclude that competency to stand trial should automatically mean the defendant is capable of making a knowing and intelligent waiver of his right to counsel. Such a competency determination reflects that the defense did not meet its burden of overcoming the general presumption of competency to stand trial. *It does not establish competency as a baseline for all purposes.* *Slip Op.* at 9 n.2. (emphasis added).

The concern in both *Edwards* and *Rhome* is to what extent a trial court, whose waiver determination is an ad hoc determination, can and should go to assure a fair hearing for a pro se defendant whose mental competency is questioned. As the *Edwards* court stated, *Faretta* was never intended to allow mentally ill defendants to act as their own attorney in a criminal proceeding. *Edwards*, 554 U.S. at 175. Rather, “[t]he *Edwards* Court observed that the standard to determine whether a defendant is competent to stand trial assumed he will *assist* in his defense, not conduct his defense, and therefore competency to stand trial does not automatically equate to a right of self-representation.” *Slip Op. at 5*. (emphasis maintained).

Analyzing the various ways in which federal and state precedent distinguishes between competency to waive counsel and competency to stand trial, *Rhome* reveals the constitutional significance of the issue. The court recognized “issues surrounding the right to counsel and waiver of counsel are undoubtedly linked to the fundamental fairness of a proceeding.” *Slip Op. at 13-14*.

Although not discussed in *Rhome*, this question of a more stringent standard has been considered by our Supreme Court in attorney discipline cases, and should be extended to criminal

defendants. *In re Meade*, 103 Wn.2d 374, 693 P.2d 713 (1985).

There, the testimony of the psychiatrist established that Meade intellectually understood the nature of the proceedings but his mental condition interfered with his understanding of the underlying situation and it was impossible for him to respond appropriately or to raise legitimate defenses. The Court held that even if Meade was competent to appear because he understood the nature of the proceedings and was capable of rationally assisting his counsel, it did not follow that he was capable of defending himself *pro se*. *Id.* at 381. In fact, the court went on to hold:

“In the future, if a hearing officer has reasonable cause to question the mental competency of an attorney appearing in a disciplinary proceeding...the hearing officer, disciplinary board or a panel *shall* order a hearing *to determine whether the attorney is competent to conduct a proper defense.*” *Id.* at 382. (emphasis added).

The court clearly stated,

“If an attorney does not have the requisite mental competency to intelligently waive the services of counsel or to *adequately represent himself...the attorney’s due process right to a fair hearing is violated if the attorney is allowed to proceed pro se.*” *Id.* at 381.

It appears in *Meade*, to protect the fairness of the proceedings, the court (1) drew a distinction between the competency to intelligently waive the services of counsel and the competency to proceed pro se; and (2) required a separate hearing to determine competency to proceed pro se.

In Mr. Lawrence's case there is no question that competency was an issue; yet, two equally seasoned jurists came to completely different determinations as to whether he should be allowed to proceed pro se. Judge Frazier presided over many of the hearings and twice ordered Mr. Lawrence to be evaluated and treated at Eastern State Hospital. He concluded that while competent to stand trial, Mr. Lawrence was not competent to represent himself. Judge Acey who eventually presided over the trial used the standard colloquy and, without any inquiry into Mr. Lawrence's questionable competency, allowed him to conduct his own defense.

For the majority of defendants, whose competency is unquestioned, the standard colloquy for self-representation meets the requirements of due process. However, for those criminal defendants whose competency is at issue, such rote recitations cannot meet the necessary standards of a fair process; the defendant's competency may inherently affect his ability to

understand the nature, extent, and result of waiving counsel, as was the case with Mr. Lawrence.

Just as in an attorney discipline matter, a more stringent rule must be crafted to meet the most basic objective of the Constitution, to provide a fair trial.

3. Irrespective Of The *Rhome* Decision, The Trial Court Abused Its Discretion When It Found Mr. Lawrence Competent To Stand Trial And To Proceed Pro Se.

The legislature has established the necessary steps the court must take when a defendant's competency is called into question and the court is aware the defendant may be developmentally disabled. RCW 10.77.060(1)(a), RCW 10.77.084(1)(b). This legislatively mandated requirement provides a trial judge with important and accurate information when determining competency. In the absence of expert testimony regarding any developmental disability and its effect on Mr. Lawrence's ability to understand the charges against him and to meaningfully assist his counsel, the court abused its discretion in finding him competent to stand trial.

Additionally, *Rhome* notes that *Edwards* holds a state court *may* take mental health status into account and strongly suggests such considerations are integral to a knowing and intelligent waiver

of counsel. *Slip Op.* at 11. In *Hahn*, the court explained that trial courts “do not have a duty to make an *enhanced* probe into a defendant’s competency to waive his right to counsel; it simply held that *trial courts must make a separate inquiry* into this matter.”

Hahn, 106 Wn.2d at 892-93. (emphasis added),

Unlike Rhome, who was found competent without reservation, Mr. Lawrence’s mental status was a matter of concern beginning at arraignment. *Slip Op.* at 15; (RP 52, 55, 66, 82, 100, 107-08, 128, 157, 159-160, 168, 182-83, 188, 260, 509). Judge Frazier expressed his doubts about Mr. Lawrence’s competency many times. Clearly, Judge Frazier’s determination that Mr. Lawrence was not competent to proceed pro se was based on his knowledge and observations of Mr. Lawrence’s conduct, background, experience and the psychiatric reports.

Despite the massive record detailing outbursts, hospitalizations, diagnoses, and irrational behavior, as well as Judge Frazier’s ruling, Judge Acey never made inquiry into Mr. Lawrence’s mental competency to represent himself. Even under the current minimal standard, the trial court was charged with making some type of inquiry. If the trial court had not had the extensive record, it is conceivable that a separate inquiry might not

have been necessary. However, here, because there was such a voluminous record, the trial court abused its discretion when it found Mr. Lawrence's waiver of counsel was knowing and intelligent.

E. Conclusion

Based on the foregoing facts and authorities, this court should craft a due process based rule to protect the constitutional rights of mentally ill defendants who wish to proceed pro se. Mr. Lawrence further urges this court to vacate the judgment and sentence and remand for a new trial.

Dated this 10th day of October 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for Appellant Lewis A. Lawrence, do hereby certify under penalty of perjury under the laws of the State of Washington, that a true and correct copy of the Supplemental Brief of Appellant was sent by first class mail, postage prepaid on October 10, 2011, to Lewis A. Lawrence, DOC 340475, Washington State Penitentiary, 1313 N. 13th Ave, Walla Walla, WA 99362; and Denis Paul Tracy, Whitman County Prosecutor, PO Box 30, Colfax, WA 99111.

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