

FILED
Nov 17, 2011
Court of Appeals
Division III
State of Washington

No. 30003-0-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

BLAYNE COLEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON, FOR GRANT COUNTY

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT 5

 1. THE TRIAL COURT DENIED MR. COLEY THE DUE
 PROCESS OF LAW WHEN IT PLACED THE BURDEN
 OF PROVING HIS INCOMPETENCY ON HIM 5

 2. THE TRIAL COURT ERRED IN REFUSING TO
 ADDRESS MR. COLEY’S REQUEST TO PROCEED
 PRO SE..... 8

 a. A criminal defendant has the absolute right to
 represent himself if he makes a timely and
 unequivocal request..... 8

 b. Mr. Coley repeatedly and unequivocally
 requested to represent himself..... 9

E. CONCLUSION 12

TABLE OF AUTHORITIES

Constitutional Provisions

Const. Art. I, § 22	1, 8
U.S. Const. amend. VI.....	1, 8
U.S. Const. amend. XIV	1, 5

Washington Supreme Court

<u>Born v. Thompson</u> , 154 Wn.2d 749, 117 P.3d 1098 (2005)	6, 7
<u>State v. Heddrick</u> , 166 Wn.2d 898 215 P.3d 201 (2009)	5, 7
<u>State v. Madsen</u> , 168 Wn.2d 496, 229 P.3d 714 (2010).....	8, 11
<u>State v. Wicklund</u> , 96 Wn.2d 798, 638 P.2d 1241 (1982).....	6, 7

Washington Court of Appeals

<u>State v. Fritz</u> , 21 Wn.App. 354, 585 P.2d 173 (1978).....	8, 9
<u>State v. Hurst</u> , 158 Wn.App. 803, 244 954 (2010), <u>review</u> granted, 253 P.3d 392 (2011).....	6, 7
<u>State v. Vermillion</u> , 112 Wn.App. 844, 51 P.3d 188 (2002)	9

United States Supreme Court

<u>Cooper v. Oklahoma</u> , 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996).....	5, 6
<u>Drope v. Missouri</u> , 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975)	5
<u>Dusky v. United States</u> , 362 U.S. 402, 80 S.Ct. 788, 4 L. Ed. 2d 824 (1960).....	5
<u>Faretta v. California</u> , 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).....	8, 9
<u>Illinois v. Allen</u> , 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1978)	9
<u>Johnson v. Zerbst</u> , 304 U.S. 456, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)	8
<u>Medina v. California</u> , 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992).....	6
<u>Patterson v. New York</u> , 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977).....	7

Other Authorities

Ferguson, 12 Washington Practice, Criminal Procedure and Practice, (2004)6

A. ASSIGNMENTS OF ERROR

1. The trial court deprived Blayne Coley of the due process of the law in violation of the Fourteenth Amendment when it placed on him the burden of proving his incompetency.

2. The trial court denied Mr. Coley his right to represent himself in violation of the Sixth and Fourteenth Amendments and Article I, section 22.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. United States Supreme Court cases permit the states to determine the procedures to employ in competency proceedings within constitutional limits. Thus, in a competency proceeding, compliance or lack thereof with state procedural requirements is in large part determinative of whether a person has been afforded due process as required by the Fourteenth Amendment. Washington courts have recognized that the competency procedures in RCW 10.77 require the State to carry the burden of proof. Where the trial court required Mr. Coley to carry the burden of proof, did the court deprive him of due process in violation of the Fourteenth Amendment?

2. The Sixth and Fourteenth Amendments and Article I, section 22, guarantee a criminal defendant the right to represent

himself so long as the request is timely, unequivocal, and knowingly and voluntarily made. Mr. Coley made repeated requests to represent himself beginning nearly 18 months prior to trial. Mr. Coley's requests were not equivocal nor accompanied by a request to delay trial. Where the court repeatedly deferred ruling on the motions without ever resolving the matter, did the Court deny Mr. Coley his right to represent himself?

C. STATEMENT OF THE CASE

When police officers answered calls regarding a heated argument between Mr. Coley and his girlfriend, Christine Hill, Mr. Coley without prompting volunteered that he had been sexually assaulted by Ms. Hill's then 13 year-old son, Sage. 12/16/10 RP 243-45. Officers arrested Mr. Coley.

Mr. Coley gave additional statements repeating his claims of victimization, and describing two incidents in which he and Sage engaged in sexual intercourse. 12/16/10 RP 320-23. In Mr. Coley's words, he allowed Sage "to sodomize" him. Id. at 323.

Shortly after charges were filed defense counsel voiced to the court his concerns regarding Mr. Coley's competency. 7/8/08 RP 1. Based on counsel's concerns the court ordered Mr. Coley to undergo a competency evaluation at Eastern State Hospital.

Following that evaluation the court found Mr. Coley competent.

12/9/08 RP 1.

At a hearing in February 2009, Mr. Coley made a motion to represent himself. 2/10/09 RP 5. After a brief colloquy the court granted that request. Id. at 5-12. The court appointed defense counsel as stand-by counsel. Id. at 11.

At a subsequent hearing Mr. Coley made a motion to “resign my pro se counsel” coupled with a motion to waive his presence at future hearings. 3/9/09 RP 3. The court promptly and with minimal comment reappointed counsel for Mr. Coley. Id. 3. The court did not rule on Mr. Coley’s request to waive his presence.

Following yet another continuance, sought by defense counsel over Mr. Coley’s objection, Mr. Coley requested that he be permitted to return to his pro se status. 3/31/09 RP 5; 4/20/09 RP 1. The trial court engaged in a brief conversation with Mr. Coley regarding his request. 4/20/09 RP 6-8. Following that conversation the court expressed its concern that Mr. Coley was not competent. Id. at 13. Thus, rather than rule on Mr. Coley’s pro se request, the court referred him for further evaluation at Eastern State Hospital. Id. at 16.

On July 16, 2009, at the recommendation of the staff at Eastern the Court found Mr. Coley incompetent and ordered an additional 90-day commitment to permit possible restoration of competency. CP 38-39

In October 2009, the court received a report from Eastern in which the staff opined Mr. Coley was now competent. 10/27/09 RP 2. Defense counsel, however, noted he had obtained a separate evaluation of Mr. Coley that concluded Mr. Coley was incompetent. 10/27/09 RP 1. The court responded that because the report from Eastern reached an opinion of competency there was no longer reason to doubt Mr. Coley's competency and thus the burden was on the defense to note a hearing and contest that conclusion. 10/27/09 RP 2.

After numerous continuances the court conducted a competency hearing on June 11, 2010. At that hearing the court determined that Mr. Coley had the burden of proving his incompetency. 6/11/10 RP 9. Following the hearing the court determined Mr. Coley was competent. CP 40-41.

A jury convicted Mr. Coley as charged. CP 61-62.

D. ARGUMENT

1. THE TRIAL COURT DENIED MR. COLEY THE DUE PROCESS OF LAW WHEN IT PLACED THE BURDEN OF PROVING HIS INCOMPETENCY ON HIM

It is unquestionably a fundamental right not to be tried while incompetent. Cooper v. Oklahoma, 517 U.S. 348, 354, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996); Drope v. Missouri, 420 U.S. 162, 171-72, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) (accused person's competency to stand trial is "fundamental to an adversary system of justice"); U.S. Const. amend. XIV. A person is competent to stand trial only when he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and to assist in his defense with "a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L. Ed. 2d 824 (1960) (internal quotations omitted).

Where a defendant's competency is at issue, a court must comply with the procedural requirements of RCW 10.77 in order to satisfy due process. State v. Heddrick, 166 Wn.2d 898, 904, n3, 215 P.3d 201 (2009). Under RCW 10.77 the State bears the burden of proving competency. State v. Wicklund, 96 Wn.2d 798,

805, 638 P.2d 1241 (1982); see also, Born v. Thompson, 154 Wn.2d 749, 753-54, 117 P.3d 1098 (2005) (noting there was no dispute that State bore the burden of proof, rather the only dispute was what standard the State must satisfy); State v. Hurst, 158 Wn.App. 803, 811, 244 954 (2010) (same), review granted on other grounds, 253 P.3d 392 (2011).¹

Despite the requirement that the State bear the burden of proof, the trial court placed the burden on Mr. Coley to prove he was not competent. To support its ruling the court relied exclusively on a single sentence in the Washington Practice series that “[a]n accused has the burden of showing that he or she is incompetent to stand trial by a preponderance of the evidence.” Ferguson, 12 Washington Practice, Criminal Procedure and Practice, §907 (2004) (citing Cooper, 517 U.S. 348; Medina v. California, 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992)).² But neither Cooper nor Medina supports that assertion as neither

¹ The Supreme Court heard argument in Hurst on October 27, 2011. As in the Court of Appeals, the question presented was not whether the State had the burden of proof, but by what standard was the State to prove an additional 180-day commitment was necessary under RCW 10.77.086.

² Ferguson goes further to incorrectly state, without citation to any authority, that this burden flows from the “presumption of sanity.” But sanity and competency are two distinct concepts. The first deals with the defendant’s mental state at the time of the commission of the offense and the second deals with the defendant’s mental state at trial. A finding of one has no effect on the other.

placed the burden of proof on the defendant. Medina merely held that a court could constitutionally place the burden of proof on the defendant, although it did not require that States do so. 505 U.S. at 449. Cooper reiterated that conclusion but limited the burden which could be placed on the defendant to no higher than a preponderance standard. 517 U.S. at 369. As those cases explicitly recognized, which party bears the burden is a matter for individual states. Medina concluded that “because the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition it is appropriate to exercise substantial deference to legislative judgment in this area.” 505 U.S. at 445-46 (citing Patterson v. New York, 432 U.S. 197, 202, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977)). Wicklund, Born and Hurst have recognized that RCW 10.77 places the burden on the State. Because the RCW 10.77 places the burden on the State, the trial court’s failure to comply with that procedure deprived Mr. Coley of due process. Heddrick, 166 Wn.2d at 904, n.3.

2. THE TRIAL COURT ERRED IN REFUSING TO ADDRESS MR. COLEY'S REQUEST TO PROCEED PRO SE.

a. A criminal defendant has the absolute right to represent himself if he makes a timely and unequivocal request.

Article I, section 22 of the Washington Constitution explicitly guarantees a defendant the right to “appear and defend in person, or by counsel.” State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). The United States Supreme Court has recognized the Sixth Amendment implicitly provides a right to self-representation. Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

A valid waiver of counsel requires the trial court ensure the accused knowingly, voluntarily, and intentionally relinquishes this fundamental constitutional right. Johnson v. Zerbst, 304 U.S. 456, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Unlike the right to a fair trial, the right of self-representation includes the right to forgo trained legal assistance, and even embraces the “personal right to be a fool.” State v. Fritz, 21 Wn.App. 354, 359, 585 P.2d 173 (1978). It is the defendant who suffers the consequences of a conviction, and,

It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. . . . his choice must be honored out of the respect for the individual which is the lifeblood of the law.

Faretta, 422 U.S. at 834 n.46 (quoting Illinois v. Allen, 397 U.S. 337, 350-51, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1978)).

The trial court's discretion to grant a criminal defendant's request for self representation "lies at a continuum" based on the timeliness of the request:

(a) if made well before the trial ... and unaccompanied by a motion for continuance, the right of self-representation exists as a matter of law; (b) if made as the trial ... is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (c) if made during the trial ... the right to proceed pro se rests largely in the informed discretion of the trial court.

State v. Vermillion, 112 Wn.App. 844, 855, 51 P.3d 188 (2002) (quoting Fritz, 21 Wn.App. at 361).

b. Mr. Coley repeatedly and unequivocally requested to represent himself. On April 20, 2009, Mr. Coley requested that he be permitted to waive his right to be represented by counsel and represent himself. 4/20/09 RP 1-2. The court briefly discussed the matter with Mr. Coley but the court determined its concerns for Mr. Coley's competency required the court to refer him for further

evaluation at Eastern State Hospital. Id. at 4/29/09. The court did not resolve Mr. Coley's waiver of counsel.

Following a lengthy confinement at Eastern, Mr. Coley was again before the court in November 2009, at which time he continued to voice his displeasure with his attorney. 11/9/09 RP 8.

After several lengthy delays, a competency hearing was finally held in June 2010. At that hearing, Mr. Coley again stated he wished to represent himself. 6/11/10 RP 140-42. Although the court had still not ruled on Mr. Coley's April 2009 motion to represent himself, and did not rule on the request then in front of it, the Court told Mr. Coley he would need to renew the motion at a later date. 6/11/10 RP 143-44, 162.

Mr. Coley made his request to proceed *pro se* roughly 20 months prior to the commencement of trial. Yet the court never ruled on the motion. Indeed, the initial motion was followed by Mr. Coley's commitment for a competency evaluation.

Importantly, Mr. Coley's commitment for evaluation does not bar him from being able to represent himself. RCW 10.77.020(1) permits a person proceed *pro se* even during competency proceedings.

But even assuming the court could properly defer ruling on the motion pending its determination of Mr. Coley's competency, there was no basis to defer its ruling after it found Mr. Coley was competent. That deferral is even less defensible in light of Mr. Coley renewal of his request at the competency hearing.

The State cannot respond that Mr. Coley had an obligation to renew the motion yet again.

There is no requirement that a request to proceed pro se be made at every opportunity. Further, a trial court's finding of equivocation may not be justified by referencing future events then unknown to the trial court. Such prophetic vision is impossible for the trial court.

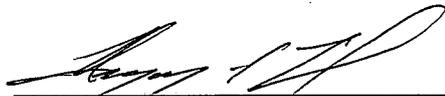
Madsen, 168 Wn.2d at 507. Mr. Coley made and renewed his motion several times. His initial motion was met with commitment, and his subsequent renewals were simply deferred. "Incompetency may be a legitimate basis to find a request for self-representation equivocal, involuntary, unknowing, or unintelligent. However, simply deferring ruling is incorrect as a matter of law." Madsen, 168 Wn.2d at 509.

Mr. Coley timely, repeatedly and unequivocally requested to represent himself. The trial court never ruled on his requests. This Court must reverse Mr. Coley's convictions.

E. CONCLUSION

For the reasons above this Court must reverse Mr. Coley's convictions.

Respectfully submitted this 17th day of November, 2011.



GREGORY C. LINK – 25228
Washington Appellate Project – 91072
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 30003-0-III
)	
BLAYNE COLEY,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF NOVEMBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] D. ANGUS LEE, DPA GRANT COUNTY PROSECUTOR'S OFFICE PO BOX 37 EPHRATA, WA 98823-0037	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] BLAYNE COLEY 345865 MCC-WSR PO BOX 777 MONROE, WA 98272	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF NOVEMBER, 2011.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711