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JUN 01, 2012
Court of Appeals
Division III
State of Washington

30079-0-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LUIS A BALLESTEROS,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:

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State v. Brasel, 28 Wn. App. 303, 623 P.2d 696 (1981) 6-8

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the acceptance of the NGI (not guilty by reason of insanity) plea and the order of commitment.

III. ISSUE

Does the record establish the voluntariness of the Defendant's not guilty by reason of insanity plea where the Defendant was thoroughly restored to competency after lengthy discussions of his rights, the offense, the charge, and the consequences and where the Defendant acknowledged before the court his understanding of the indefinite term of commitment?

IV. STATEMENT OF THE CASE

The Defendant Luis Ballesteros was charged with burglary in the first degree, assault in the second degree, and attempted theft in the third degree. CP 1-2; RP 3[1]. The Defendant has a criminal history of two prior assaults in

[1] RP indicates the Report of Proceedings for December 6, 2010 and January 18, 2011.

the second degree, an assault in the third degree, and robbery in the second degree. CP 30, 75.

On June 3, 2010, the Defendant was released from prison. CP 48, 65. In the months prior to his release and subsequent to his involvement in a fight, prison officials questioned the Defendant about mental health issues. CP 28-35. He was "appropriately embarrassed and nervous" when discussing his criminal history and repeatedly denied any mental health issues and refused to participate in mental health services and treatment. CP 28-29, 31-32. The mental health counselors noted that the Defendant's physical complaints disappeared after the Defendant was removed from housing where he had been victimized. CP 33-34. Ultimately, the prison staff diagnosed him as malingering. CP 35.

Upon his release, the Defendant was put on a bus to Pasco. CP 4, 22, 48, 65. The prison warned the bus driver that the Defendant was not trustworthy. CP 22. The bus made a stop in Walla Walla, where the Defendant got off the bus and entered the Touchet Mercantile. CP 4, 22, 48, 65. He made a purchase before heading to the back storage room when he began to rifle through items and palmed keys. CP 4, 24, 48, 65-66. A six year old child was sleeping in the storage room. CP 4. When the beer

delivery person Joseph Hunt entered the storage room with a cart of stock, the defendant closed the door behind him and assaulted him, bruising his eye. CP 4-5, 22, 24, 48, 65.

Upon his arrest, the Defendant indicated that he was rescuing a child who "was being raped." CP 22. There was no indication of any assault on the little girl, who was observed to have slept through the assault and arrest. CP 22.

After being assigned counsel, the Defendant's statements and behavior caused his attorney concern for his mental health. CP 8-10. The Defendant was assessed at Eastern State Hospital (ESH). CP 46-51, 60-67. Initially, the experts determined the Defendant to be incompetent. CP 46-51. The Defendant was held for restoration of competency. CP 52-57.

Advised that his statements at ESH were not confidential (CP 61), the Defendant admitted that he had not witnessed any assault on the child, had taken keys from the storage room, and had fought with Mr. Hunt. CP 65-66. He was able to recite his charges. CP 63 (awareness of charges). He appreciated that he was charged with felonies. CP 64 (ability to appreciate charges). He understood what rights he would have if he went to trial. CP 64-65 (knowledge of procedures, ability to challenge witnesses, ability to

testify relevantly). Doctor Grant and the Defendant "discussed the consequences of a successful NGRI [not guilty by reason of insanity] plea at some length." CP 64 (knowledge of procedures). He understood that a successful NGRI would likely result in an extended hospitalization at ESH. CP 64 (knowledge of procedures). He expressed at the time that "a relatively brief sentence would be preferable to extended hospitalization at Eastern State Hospital." CP 64, 65 (knowledge of procedures, motivation to defend).

After a period of treatment, the Defendant was restored to competency and returned to Walla Walla. CP 60-67, 70-72; I RP 1-2. However, the assessment report notes that the Defendant is chronically mentally ill, which has resulted in numerous violent offenses. CP 66-67. Dr. Grant found the Defendant to present "a substantial likelihood of committing criminal acts jeopardizing public safety or security." CP 67.

On December 6, 2010, the Defendant returned to court where he was arraigned on this matter and in another case on two counts of custodial assault. RP 3. The Defendant pled not guilty. RP 4.

On January 18, 2011, the parties came to court for a change of plea and order of commitment. RP 5. Before the plea was entered, the prosecutor handed the judge findings, conclusions, and an order of commitment. RP 5.

The Defendant changed his plea to not guilty by reason of insanity, and the State dismissed the custodial assault charges in the other case. RP 5-8. The superior court found the change in plea "justified under the circumstances" and entered findings, conclusions, and an order committing the Defendant to the jurisdiction of ESH as criminally insane pursuant to RCW 10.77. CP 76-80; RP 8.

The judge explained that the commitment was for an indefinite period and confirmed the Defendant's understanding.

> THE COURT: ...And you will remain at Eastern State Hospital as long as the secretary shall designate, subject to further proceedings by this Court for conditional or final discharge.
> Do you understand that?
>
> THE DEFENDANT: Yes, I do.

RP 9.

On June 29, 2011, the Defendant contacted the superior court indicating a desire to appeal. CP 82-83. The Defendant filed a notice of appeal on July 7, 2011. CP 85-86.

V. ARGUMENT

THE RECORDS ESTABLISHES THE VOLUNTARINESS OF THE DEFENDANT'S PLEA.

The Defendant argues that the record does not establish the voluntariness of his plea as required by *State v. Brasel*, 28 Wn. App. 303, 623 P.2d 696 (1981). The State disagrees. There is sufficient record to meet the requirements set forth in *State v. Brasel.*

The Defendant notes that as a matter of due process, the court may only accept a plea of NOT guilty by reason of insanity if the record establishes that the Defendant understood the nature and consequences of his plea. Equating the NGI (not guilty by reason of insanity plea) with a guilty plea is amply defended in *State v. Brasel*, 28 Wn. App. 303, 623 P.2d 696 (1981).

The defendant Brasel was examined at Western State Hospital, where the staff determined that he was competent, but had been legally insane at the time of the offense. *State v. Brasel*, 28 Wn. App. at 305. The prosecutor agreed with the experts, and defense counsel asked for an acquittal by reason of insanity. *State v. Brasel*, 28 Wn. App. at 305-06. Later, the defendant appealed from the order of commitment, arguing inter alia that the court should not have granted his motion for acquittal, because he did not

understand the consequences of his own motion. *State v. Brasel*, 28 Wn. App. at 311.

> In essence, defendant argues that there are constitutional constraints on the acceptance of an RCW 10.77.080 motion for acquittal by reason of insanity that are similar to those on the acceptance of a guilty plea. We agree.

Id.

> ... due process entitles a defendant to have such a judgment vacated unless he understood, at the time of the motion for acquittal by reason of insanity, the nature of the charges against him and the consequences of the motion.

State v. Brasel, 28 Wn. App. at 312.

Finding an inadequate record to determine the Defendant's understanding, the court reversed the order of commitment and remanded the case for a determination that the motion was made voluntarily and intelligently. *State v. Brasel*, 28 Wn. App. at 312-13.

> Because we equate an RCW 10.77.080 motion with a plea of guilty for due process purposes, we remand for an evidentiary hearing and the entry of findings as to whether defendant was informed of and understood: (1) the essential elements of the offense charged; (2) that by making the motion he admitted to committing the acts charged and that, if acquitted, he might not later contest the validity of his detention on the ground that he did not commit the acts charged; (3) that by making the motion he waived his rights to remain silent, to confront his accusers, and to be tried by a jury; and (4) that, if acquitted, he could be committed to a state hospital for the criminally insane for a term up to the maximum possible

> penal sentence for the offense charged. If Mr. Brasel did not understand the nature and consequences of the RCW 10.77.080 motion, the judgment of acquittal by reason of insanity must be vacated upon defendant's motion.

State v. Brasel, 28 Wn. App. at 313.

Unlike *Brasel*, the record in the instant case demonstrates that these four criteria are met here.

When the Defendant was arraigned, he would have been provided with the charging information which sets forth the elements of the crime. CP 1-3; RP 3-4. In restoring the Defendant to competency, Dr. Grant thoroughly educated and informed the Defendant, sufficient to permit a plea of guilty or not guilty by reason of insanity. CP 63-65. In particular, the doctor discussed the NGI plea "at some length" with his patient. CP 64. Dr. Grant determined that the Defendant was able to appreciate the charges. CP 64. The Defendant admitted the facts which comprised the crimes. CP 65-66. In fact, the Defendant was able to explain to the doctor the basis for the theft charge. CP 66. The doctor made sure the Defendant understood his trial rights (confrontation rights, ability to testify, etc), which he gave up by pleading NGI. CP 64-65.

While the Defendant has written letters arguing that he did not know he would be held indefinitely, this complaint is plainly self-serving. He told

Dr. Grant that he anticipated he could negotiate a plea bargain with "a relatively brief sentence (due to mitigating factors involved)." CP 65. He said he preferred a plea bargain to an NGI plea, because he preferred a brief sentence to "extended" or "lengthy" hospitalization at ESH. CP 64, 65. In other words, when he changed his mind, he was well aware of the consequences he was facing. The judge also confirmed that the Defendant was aware that he would "remain at Eastern State Hospital as long as the secretary shall designate." RP 9.

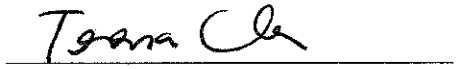
The record establishes the voluntariness of the plea on which the Order of Commitment relies.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's plea and the Order of Commitment.

DATED: June 1, 2012.

Respectfully submitted:



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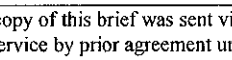
Jan Gemberling <admin@gemberlaw.com> <jan@gemberlaw.com> Luis Ballesteros Eastern State Hospital P.O. Box 800 850 W. Maple Street Medical Lake, WA 99022-0800	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED June 1, 2012, Pasco, WA  **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**