

No. 31318-2-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED
JAN 31, 2014
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON, Respondent,

v.

BRANDON VANWINKLE, Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR.....1

 1. The court erred by failing to enter written findings and conclusions after the CrR 3.5 hearing.....1

 2. The court erred by finding Brandon VanWinkle competent to stand trial.....1

 3. The court erred by permitting Mr. VanWinkle to proceed pro se.....1

Issues Pertaining to Assignments of Error

 A. Did the court err by failing to enter written findings and conclusions after the CrR 3.5 hearing? (Assign. of Error 1).....1

 B. Did the court err by finding Mr. VanWinkle competent to stand trial? (Assign. of Error 2).....1

 C. Did the court err by permitting Mr. VanWinkle to proceed pro se? (Assign. of Error 3).....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT.....9

 A. The court erred by failing to enter written findings and conclusions after the CrR 3.5 hearing.....9

 B. The court erred by finding Mr. VanWinkle competent to stand trial and by permitting him to proceed pro se.....10

IV. CONCLUSION.....15

TABLE OF AUTHORITIES

Bowcutt v. Delta N. Star Corp., 95 Wn. App. 311, 976 P.2d 643 (1999).....12

<i>City of Bellevue v. Acrey</i> , 103 Wn.2d 203, 691 P.2d 957 (1984)....	13
<i>Faretta v. California</i> , 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975).....	13
<i>In re Personal Restraint of Rhome</i> , 172 Wn.2d 654, 260 P.3d 874 (2011).....	14
<i>Indiana v. Edwards</i> , 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed.2d 345 (2008).....	14
<i>Pate v. Robinson</i> , 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed.2d 815 (1966).....	10
<i>State v. Benn</i> , 120 Wn.2d 631, 845 P.2d 289 (1993).....	10
<i>State v. Landsiedel</i> , 165 Wn. App. 886, 269 P.3d 347, review denied, 174 Wn.2d 1003 (2012).....	10
<i>State v. Lawrence</i> , 166 Wn. App. 378, 271 P.3d 280, review denied, 174 Wn.2d 1009 (2012).....	15
<i>State v. Lewis</i> , 141 Wn. App. 367, 166 P.3d 786 (2007).....	10
<i>State v. Madsen</i> , 168 Wn.2d 496, 229 P.3d 714 (2010).....	13
<i>State v. Ortiz</i> , 104 Wn.2d 479, 706 P.2d 1069 (1985), cert. denied, 476 U.S. 1144 (1986).....	11
<i>State v. Rundquist</i> , 79 Wn. App. 786, 905 P.2d 922 (1995), review denied, 129 Wn.2d 1003 (1996).....	11
<i>State ex rel. Junker v. Carroll</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	11
Constitutional Provisions	
Sixth Amendment.....	13
Wash.Const., art. 1, § 22.....	13

Statutes

RCW 10.77.050.....10

I. ASSIGNMENTS OF ERROR

1. The court erred by failing to enter written findings and conclusions after the CrR 3.5 hearing.
2. The court erred by finding Brandon VanWinkle competent to stand trial.
2. The court erred by permitting Mr. VanWinkle to proceed pro se.

Issues Pertaining to Assignments of Error

- A. Did the court err by failing to enter written findings and conclusions after the CrR 3.5 hearing? (Assignment of Error 1).
- B. Did the court err by finding Mr. VanWinkle competent to stand trial? (Assignment of Error 2).
- C. Did the court err by permitting Mr. VanWinkle to proceed pro se? (Assignment of Error 3).

II. STATEMENT OF THE CASE

On August 1, 2012, Mr. VanWinkle was charged by information with custodial assault. (CP 1). At a pretrial hearing held August 23, 2012, the court went through a colloquy with Mr. VanWinkle about representing himself after another judge had previously granted his request some two weeks before. (8/912 RP 4; 8/23/12 RP 2). The court advised him custodial assault was a

class C felony with a maximum penalty of 5 years in prison and a \$10,000 fine and he had the right to have an attorney appointed to represent him in case he could not afford one. (*Id.*) Mr. VanWinkle was then asked if he wished to be represented by a lawyer. (*Id.* at 2-3). He replied:

Yeah, this is – it’s just a made-up allegation on the officer’s part, so I’m just going to represent myself. It’s pretty much a open-and-shut case and if – if we’re going to go to trial, let’s go to trial, I’m ready. You know what I mean? So please don’t waste my time. (*Id.* at 3).

Upon inquiry by the court, Mr. VanWinkle said he had taken business law, had gone to college “far enough to beat this case,” knew the possible punishment, had a lot of experience with the court system, and reiterated “I don’t need no assistance.” (8/9/12 RP 3-4). The court also advised him he would be held to the standard of an attorney and his errors would not be forgiven on appeal. Mr. VanWinkle said, “Yeah, we won’t have to worry about that.” (*Id.* at 4). The court was satisfied he wanted to go forward without an attorney and had the ability, “at least nominally,” to do that so it accepted his waiver. (*Id.*). An attorney, however, remained as standby counsel. (*Id.* at 5-6).

At this same August 23 hearing, the State moved to continue a CrR 3.5 hearing. In addressing the court, Mr. VanWinkle said;

This is my – my – this is my day. This is my court. . .

This is [the judge's] courtroom, but you're working for me. I've got the State of Washington versus Brandon VanWinkle this is what I'm trying to put into the record. You might want to kick back, dude. . .

So anyway. In the Superior Court of Washington for Benton County, State vs Brandon VanWinkle, defendant, 78745, cause twelve eleven zero zero nine, alleged custodial assault. I'm issuing the order of the above court for show cause in my file. This is contact files and criminal legal defense in the above alleged charge. I will need these files and witness interviews one week before trial. Thank you. Thank you for your time and consideration in this very important matter. Please have a wonderful day, the one and only Brandon VanWinkle. . . . This is a petition for the following causes to the above case in Superior Court for my trial on September 10th, 2012. We need full report of Sergeant Schaefer for when he caught – was caught in a sexual act with his pants and his panties down on shift, acting sergeant, and this is their material witness. I need that officer and the subpoena, the name of the woman that he did this with in the court. Or he did this in the jail. OK. So we're going to go ahead and get that on file. And then I need a full criminal history and any disciplinary actions that has taken place of the then acting officers for the Benton County Sheriff office for their career, question prosecutor's witness before trial. During the trial, I'm going to do field trip with 12 jurors, bring them through the jail to show them the whole of the process and procedures and packing that they used, the three officers used to get me out of my cell and create fake charges when I was alleged or when I was already in the hole, moving me from one cell to another and filed fake charges. OK. . . This is a petition to subpoena the following witnesses to the

above court for trial on September 10th, 12. I've got Daryl Mark Forsner. The officers assaulted this man. They tranquilized him with their taze guns. He got \$350,000 from you cats. We can go ahead and bring him in. We're going bring him in here, because he's the one that was running this show at the time. We're going to bring Kathy Daniels in here. We're going to bring Officer Reese in here. We're going to bring Officer Voss, Sergeant Schaefer, Mr. Obama, Christina Aguilera, Theresa Hollenbaugh, Short Hollenbaugh, Jimmy Valdez. Christina Roberts is definitely going to be a material witness on the stand. Watch this. It's going to be a doozy. Mark Clark, Officer Gofer, which, um, Mr. Schaefer was going ahead and try and do sexual acts with her when I caught him doing this. OK. This is the 15 witnesses I need at my trial at the above date. Thank you for your time and consideration in this very important matter. There you go. I want to get copies of this and put that in the file. This is going to be an awesome – trial. You've got to be there. (8/23/12 RP 11-12).

Based on having spent some time with Mr. VanWinkle and after hearing these comments, the State voiced "serious concerns about [Mr. VanWinkle's] competency at this trial with some of the witnesses that he listed." (*Id.* at 12). Addressing the deputy prosecutor, Mr. VanWinkle told her she might want to go read the Bible. (*Id.*). When the court stated it would entertain a motion for evaluation at Eastern State, he asked if "you guys know who I am" and went on to elaborate:

Well, Brandon VanWinkle, R-I-P. You guys really want to know who I am? Are you guys that ignorant? You guys are gang surrounded. This is area 52. OK? I'm

Jesus Christ. Resurrected. On February 22nd, 2012. My birthday's 7-11. I was born and weighed 7-11. If you guys don't know who I am, you better go read the Bible and go to Ezekiel 7:11, and when you guys get done reading that tonight, you'll know what's going to happen. Have a good day. (*Id.* at 14).

After Mr. VanWinkle wished good luck to “[a]ll y’all,” the court entered an order for mental health evaluation. (CP 12).

The evaluation was done at Eastern State Hospital and a report sent to the judge on October 16, 2012. (CP 30). The licensed psychologist conducting the forensic evaluation opined:

Diagnosis: Mr. VanWinkle does not have a mental disease or defect.

Competency: Mr. VanWinkle has the capacity to understand court proceedings and productively participate in his own defense. (*Id.*).

At a hearing after Eastern determined he was competent, Mr. VanWinkle’s standby counsel said she took the position she was not representing him as he was pro se, but she would request a second evaluation if she were. (10/18/12 RP 15). When the court asked him if he wanted a second evaluation, he said he did not want one because he did not need another. (*Id.* at 16). An order of competency was entered. (CP 17).

Mr. VanWinkle proceeded to address the court:

OK. I'm sitting here trying to prove my innocence in your guys' courts, but yet I keep getting assaulted by these officers, and they keep me in the hole. I have been in the hole over 80 days. And you guys keep making up these allegations. I'm a college graduate from Pierce College. I've taken business law, taken business classes, and you guys keep acting like I'm a crazy ass lunatic, and I keep getting assaulted by officers. (10/18/12 RP 18).

Mr. VanWinkle also advised the court about some motions he had prepared and wanted heard. (*Id.* at 19-20). The State mentioned the motions were pretty simple, but the parties were back to President Obama being on his witness list. (*Id.* at 23).

On November 1, 2012, the court held a CrR 3.5 hearing. Mr. VanWinkle called his standby counsel "worthless," told her she was going to prison for a long time, and said, "You're wasting my time, girl." (11/1/12 RP 5, 6, 7). He repeatedly interrupted standby counsel's presentation to the court with abusive remarks. (*Id.*). Nonetheless, the court did not release her from her duties and ordered her to be in the courtroom during the trial, but she did not have to assist unless Mr. VanWinkle requested it. (*Id.* at 14). He told the judge he was "real good" at reverse psychology and was going to make the State's witnesses "look like shit in the courtroom." (*Id.* at 16). The deputy prosecutor commented that every time they were in court, Mr. VanWinkle said obscenities and

other inappropriate things. (*Id.* at 21). The judge told him he was interrupting and being disruptive. (*Id.*) He answered, “You ain’t going to sit here and bully me. This is my courtroom. Believe that.” (*Id.*).

The judge said, “Take him out. This is over. The trial will go as scheduled.” (11/1/12 RP 21). Mr. VanWinkle told the judge:

You’re going to go to prison, too. How about that?
That’s where you’re going to die at. RIP in prison.
. . . Punk ass bitch. (*Id.* at 21-22).

After a short recess, court reconvened. Mr. VanWinkle said he would not be acting ridiculous at trial, “[b]ut what you guys are going to see coming near you real soon, that’s what you need to be worried about.” (*Id.* at 28).

The court explained to Mr. VanWinkle that the issues in the CrR 3.5 hearing would be confined to just admissibility issues. (11/1/12 RP 29). He then said, “Stupid ass.” (*Id.*). After hearing testimony, the court found his statements to corrections officers were admissible. (*Id.* at 52). The case proceeded to jury trial.

Mr. VanWinkle’s competency was addressed again by the trial court and he was determined to be competent. (11/5/12 RP 82). The State elicited testimony from Dennis Schaefer, a corrections sergeant at the Benton County jail, that he was on duty

on July 27, 2012, overseeing the movement of Mr. VanWinkle from cell D-7 to D-5 in D-pod. (*Id.* at 253-56). Corrections officers Lewis, Montelongo, and Ruiz were involved in the move. (*Id.* at 257). Once he was in cell D-5 and his cuffs removed through the cuff port after the door was closed, Mr. VanWinkle spit on Sergeant Schaefer through a gap in the door. (*Id.* at 259-67). The sergeant was hit by spit on the head, face, and shoulder. (*Id.* at 272). He went to get cleaned up and to medical because of the possibility of blood-borne pathogens. (*Id.* at 273). Sergeant Schaefer was concerned with his well-being and taken aback by what happened. (*Id.* at 273-74).

Officer Albert Montelongo testified he saw spit on Sergeant Schaefer. (11/7/12 RP 501). Officer Angel Ruiz heard a spitting noise and then saw spit on the sergeant. (*Id.* at 501, 606). Officer Matt Lewis saw Mr. VanWinkle spit on Sergeant Schaefer. (*Id.* at 620).

During the course of the trial, the court found Mr. VanWinkle in contempt some six times because he was disrespectful to the court and counsel, called the judge a “homie” and “home boy,” swore and disparaged the deputy prosecutor and standby counsel, continually interrupted the judge while he was speaking, failed to

follow court orders, and threatened the court and counsel. (See, e.g., 11/5/12 RP 290-91, 292, 301; 11/6/12 RP 275- 431; 11/7/12 RP 442-482, 501-65, 570-602). These transgressions took place before the jury.

There were no exceptions to the court's jury instructions. (11/8/12 RP 703-06). The court also determined it was incorrect in the way it procedurally handled the findings of contempt so it did not assess any jail time against Mr. VanWinkle. (*Id.* at 745-46). On the other hand, the court did feel that his conduct was in contempt:

Well, and I also believe clearly that your conduct during this trial was contemptuous. Repeated violations of court orders, repeatedly ignoring court orders, engaging in behaviors that were – that undermine the integrity and dignity of this court. There's no question about that. (*Id.* at 746).

The jury returned a guilty verdict. (CP 88). The court sentenced Mr. VanWinkle to 43 months, the high end of the standard range. (CP 103). This appeal follows. (CP 124).

III. ARGUMENT

A. The court erred by failing to enter written findings and conclusions after the CrR 3.5 hearing.

Written findings of fact and conclusions of law are required under CrR 3.5(c). But none were entered by the trial court.

Remand for entry of those findings and conclusions is appropriate. *State v. Landsiedel*, 165 Wn. App. 886, 269 P.3d 347, review denied, 174 Wn.2d 1003 (2012).

B. The court erred by finding Mr. VanWinkle competent to stand trial and by permitting him to proceed pro se.

Due process forbids trying a defendant who is incompetent. *Pate v. Robinson*, 383 U.S. 375, 386, 86 S. Ct. 836, 15 L. Ed.2d 815 (1966); RCW 10.77.050. A defendant is competent to stand trial only if he understands the nature of the charge against him and is capable of assisting in his own defense. *State v. Lewis*, 141 Wn. App. 367, 381, 166 P.3d 786 (2007). The court has discretion to determine if a defendant is competent and is not bound by expert opinion. *State v. Benn*, 120 Wn.2d 631, 662, 845 P.2d 289 (1993). Among the factors to be considered are the court's observations of the defendant's conduct, appearance, and demeanor, as well as counsel's statements. *Benn*, 120 Wn.2d at 662.

Although the Eastern State Hospital mental health evaluation found Mr. VanWinkle competent, his words and conduct in the pretrial and trial proceedings belie that purported competence. His inappropriate and threatening behavior and bizarre statements prompted the State to have serious concern about his competency

and asked for a mental health evaluation. (8/23/12 RP 12). This concern arose after the court had already granted Mr. VanWinkle's request to represent himself. (8/9/12 RP 3-6). Competency and self-representation go hand-in-hand in the circumstances here.

The trial court's competency determination is reviewed for abuse of discretion. *State v. Ortiz*, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985), *cert. denied*, 476 U.S. 1144 (1986). Discretion is abused when exercised on untenable grounds or for untenable reasons. *State ex rel. Junker v. Carroll*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). If the court applies an incorrect legal standard to make a discretionary decision, that is also an abuse of discretion. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), *review denied*, 129 Wn.2d 1003 (1996).

On August 9, 2012, the court held a colloquy with Mr. VanWinkle and satisfied itself that he had the nominal ability to represent himself. (8/9/12 RP 4). Standby counsel remained on the case. (*Id.* at 6). After the State later voiced concerns about Mr. VanWinkle's competency, a mental health evaluation was done finding him competent. (CP 30). An order of competency was entered, but it was apparent the court had not read the evaluation report, remarking: "We have a report indicating he's competent?"

(10/18/12 RP 15). Even at this short status hearing, the court had difficulty with Mr. VanWinkle listening, focusing, and following the rules. (*Id.* at 15-17). But it simply signed off on the order of competency without giving any reason or analysis of relevant factors for its decision. (*Id.*). Indeed, the court could not have relied on the Eastern report as a tenable basis for its finding because it was unaware of the report and clearly had neither reviewed nor considered it. The court did not exercise its discretion at all in deciding competency. Discretion unexercised is discretion abused. *Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643 (1999). The court thus erred by finding Mr. VanWinkle competent.

Moreover, in revisiting the question of his competency, the court stated Mr. VanWinkle's comments about working for the federal government and being part of a 16-year investigation would perhaps be delusional, but would not affect his competency. (11/5/12 RP 81). Although Mr. VanWinkle interrupted constantly, the court stated his conduct in trying to "strong arm" the court or the prosecutor had no impact on competency. (*Id.* at 81-82). Choosing to ignore all the rants, stage whispers, and bullying behavior of Mr. VanWinkle as well as his claiming several times to be Jesus Christ,

the court then found him competent. (*Id.* at 82). But this determination was based on untenable grounds or for untenable reasons as Mr. VanWinkle's delusional behavior reflects not competency, but a failure to understand the nature of the charge against him and to assist in his own defense. *Lewis*, 141 Wn. App. at 381. The court erred by again finding him competent.

The Sixth Amendment right to counsel carries with it the implicit right to self-representation. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed.2d 562 (1975). That right is explicit in Wash. Const., art. 1, § 22. *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). The criminal defendant must knowingly and intelligently waive the right to counsel if he wants to exercise the right to proceed pro se. *Faretta*, 422 U.S. at 835. A thorough colloquy on the record is the best practice to ensure that knowing and intelligent waiver. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984).

The court engaged in a colloquy with Mr. VanWinkle at the State's request. But it is clear in both foresight and hindsight that he made his request to represent himself without a general understanding of the consequences, a recognized basis for denying self-representation. *Madsen*, 168 Wn.2d at 503. Mr. VanWinkle

was apprised of and seemingly understood the legal pitfalls, but he failed to understand the consequences of having his demeanor and contemptuous behavior on full display while acting as his own counsel punctuated with the expressed frustration and exasperation of the court with his performance. Mr. VanWinkle failed to understand the danger, legally and practically, of proceeding pro se. With no tenable ground or reason for permitting self-representation, the court abused its discretion by doing so.

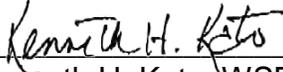
In *Indiana v. Edwards*, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed.2d 345 (2008), the United States Supreme Court decided a state could deny self-representation to a defendant who was competent to stand trial but was not competent to represent himself. 554 U.S. at 174, 178. The Washington Supreme Court addressed *Edwards* in *In re Personal Restraint of Rhome*, 172 Wn.2d 654, 260 P.3d 874 (2011), and concluded a defendant's mental health status is but one factor a trial court may consider in determining whether a defendant has knowingly and intelligently waived his right to counsel, but did not require finding that an independent determination of competency for self-representation was a constitutional mandate. 172 Wn.2d at 665.

This court in *State v. Lawrence*, 166 Wn. App. 378, 392, 271 P.3d 280, *review denied*, 174 Wn.2d 1009 (2012), adhered to *Rhome* and declined to create a new requirement that the trial court consider a mentally ill defendant's ability to represent himself at trial before accepting a waiver of counsel. Thus, competency to stand trial and "competency" for self-representation encompass the same considerations in the circumstances here. Mr. VanWinkle was not competent to stand trial so he was not competent to proceed pro se. *Lawrence*, 166 Wn. App. at 392. Accordingly, the conviction must be reversed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. VanWinkle respectfully urges this court to reverse his conviction and remand for further proceedings.

DATED this 31st day of January, 2014.


Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on January 31, 2014, I served a copy of the brief of appellant by first class mail, postage prepaid, on Brandon VanWinkle, # 787455, PO Box 777, Monroe, WA 92872; and by email, as agreed by counsel, on Andrew K. Miller at prosecuting@co.benton.wa.us.

