Supp. App.

83452-1
NO. 36350-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KRISTINA GRIER,

Appellant.

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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Beverly Grant, Judge
The Honorable Rosanne Buckner, Judge

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SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court erred in failing to observe adequate procedural safeguards regarding appellant's competency to stand trial.

2. Appellant received ineffective assistance of counsel in failing to request a limiting instruction for ER 404(b) evidence.

Issues Pertaining To Supplemental Assignments Of Error

1. The State moved for a competency evaluation before trial. The trial judge found reason to doubt appellant's competency and ordered the evaluation. A different attorney subsequently substituted as defense counsel. The new defense attorney presented an order to vacate the competency order. A different judge vacated the competency order and proceeded to trial before an expert evaluated appellant. Did the court violate appellant's constitutional right to procedural due process by proceeding to trial without first holding an evidentiary hearing to determine competency?

2. Was counsel ineffective in failing to request a limiting instruction for ER 404(b) evidence, thus allowing the jury to infer appellant committed the offense because she was a bad person and had a propensity to commit the crime?

B. SUPPLEMENTAL STATEMENT OF THE CASE

On June 26, 2006, the prosecutor requested Grier be evaluated by Western State Hospital because he had "reason to believe there's possible insanity." 3RP[1] 3. The prosecutor referenced two letters sent by Grier to the court in which she requested her guns be returned to her. CP 175-80, 181-87; 3RP 3. The prosecutor also noted Grier's flight to California after she was allowed out on bail and that no defense to the murder charge was presented. 3RP 3. Grier's defense counsel, Clifford Morey, agreed it would be prudent for Grier to be evaluated. 3RP 4. Morey revealed "I have had discussions with my client in trying to prepare for her defense and must admit that those discussions don't, don't ever, don't usually, but if not ever, lead to a conclusion where I'm satisfied that she is assisting me in the preparation of her defense." 3RP 3.

The Honorable Linda CJ Lee responded, "What I'm hearing is both sides agree that a competency evaluation is prudent. Is that correct?" 3RP 5. The prosecutor answered, "The State believes it's prudent at this point, your Honor. I see a built-in appeal issue if we don't do it." 3RP 5. The court ordered a competency hearing. 3RP 5.

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[1] The verbatim report of proceedings cited in this supplemental brief consists of two volumes referenced as follows: 3RP - 6/26/06; 4RP 7/18/06.

Judge Lee entered a written order stating, "there may be reason to doubt the defendant's fitness to proceed." CP 188-91. Pursuant to RCW 10.77.060, this order directed the staff of Western State Hospital to file a report that includes an "opinion as to the defendant's capacity to understand the proceedings and to assist in defendant's own defense." CP 190. Judge Lee further ordered "[t]his action be stayed during this examination period and until this court enters an order finding the Defendant to be competent to proceed." CP 191. The court scheduled the hearing for July 13. CP 191. The case was later rescheduled for July 18. CP 193.

On July 18, the prosecutor informed the Honorable Serjio Armijo that Grier had not yet been sent to Western State Hospital for evaluation. 4RP 2. The parties also notified the court that Gary Clower might substitute for Moore as defense counsel. 4RP 2-3. Judge Armijo rescheduled the competency hearing for July 25. CP 194; 4RP 3.

On July 25, Moore withdrew and Clower substituted as defense counsel. CP 197, 198. Upon Grier's motion, the Honorable Beverly Grant entered an order vacating the "evaluation examination at the Western State Hospital." CP 195-96. Grier never received a competency hearing.

C. ARGUMENT

1. THE COURT VIOLATED GRIER'S DUE PROCESS RIGHTS IN PROCEEDING TO TRIAL WITHOUT OBSERVING ADEQUATE PROCEDURAL REQUIREMENTS TO DETERMINE COMPETENCY.

Once a trial court finds a reason to doubt competency, it is constitutionally required to hold an evidentiary hearing to determine competency before proceeding to trial. Reversal is required because the trial court found reason to doubt Grier's competency but failed to hold a hearing before proceeding to trial.

a. Due Process Requires The Court To Conduct An Evidentiary Hearing Whenever There Is Reason To Doubt Competency.

The conviction of an accused while legally incompetent violates the constitutional right to a fair trial under the Due Process Clause of the Fourteenth Amendment. Pate v. Robinson, 383 U.S. 375, 378, 385, 86 S. Ct. 836, 15 L. Ed.2d 815 (1966). The constitutional standard for competency to stand trial is whether the accused 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." In re Fleming, 142 Wn.2d 853, 861-62, 16 P.3d 610 (2001) (citing Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)) (internal quotation marks

omitted). Under Washington statute, a criminal defendant is incompetent if (1) she lacks an understanding of the nature of the proceeding; or (2) is incapable of assisting in her defense due to mental disease or defect. RCW 10.77.010(14). "It is fundamental that no incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity continues." State v. Wicklund, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982).

The "[f]ailure to observe procedures adequate to protect an accused's right not to be tried while incompetent to stand trial is a denial of due process." Fleming, 142 Wn.2d at 863. In Pate, the state competency statute at issue directed the trial court to hold a competency hearing on its own motion whenever there was a "bona fide reason" to doubt competency. Pate, 383 U.S. at 378. The United States Supreme Court held the trial court's failure to hold a hearing violated due process because the evidence before the trial judge was sufficient to raise a genuine doubt regarding competency. Id. at 385. It is settled that a defendant's due process right to a fair trial requires the trial court to conduct an evidentiary hearing whenever there is reason to doubt a defendant's competency, even if the defendant does not request such a hearing. See, e.g., Odle v. Woodford, 238 F.3d 1084, 1087 (9th Cir. 2001); United States v. Denkins, 367 F.3d

537, 547 (6th Cir. 2004); Johnson v. Norton, 249 F.3d 20, 26 (1st Cir. 2001); Silverstein v. Henderson, 706 F.2d 361, 369 (2nd Cir. 1983).

Consistent with this constitutional mandate, once the trial court makes a threshold determination that there is "reason to doubt" the defendant's competency pursuant to RCW 10.77.060, the court must appoint an expert and order a formal hearing to determine competency before proceeding to trial. State v. Marshall, 144 Wn.2d 266, 278, 27 P.3d 192 (2001); State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991). At minimum, due process requires the trial court to make findings of fact and conclusions of law after an evidentiary hearing on the matter of competency. State v. Israel, 19 Wn. App. 773, 776, 777-78, 577 P.2d 631 (1978).

Here, Judge Lee found reason to doubt Grier's competency pursuant to RCW 10.77.060 and ordered a competency evaluation to determine Grier's capacity to understand the proceedings and assist in her own defense. CP 188-91. Judge Lee appropriately tolled the trial period until the court entered an order finding Grier competent to proceed. CP 191. An order for evaluation under RCW 10.77.060(1)(a) automatically stays the criminal proceedings until the court determines that the defendant is competent to stand trial. CrR 3.3(e)(1). Tolling is necessary because

neither side can go forward with trial preparation until the defendant is found competent to proceed. State v. Jones, 111 Wn.2d 239, 245, 759 P.2d 1183 (1988) ("When the trial court determines that there is reason to doubt the defendant's competency pursuant to RCW 10.77.060(1), the proceedings are placed in limbo.").

Judge Grant did not conduct the required evidentiary hearing and did not find Grier competent to proceed. Nor did she find there was no longer a reason to doubt Grier's competency. Instead, Judge Grant simply vacated the previous competency order entered by Judge Lee without explanation. CP 195-96. The court thus violated Grier's procedural due process right to an evidentiary hearing on the matter of competency prior to proceeding to trial. Pate, 383 U.S. at 377, 385-86; Israel, 19 Wn. App. at 776, 777-78.

b. Defense Counsel Cannot Waive His Client's Constitutional Right to A Competency Hearing After The Court Finds Reason To Doubt Competency.

Due process was not satisfied where the court vacated the competency evaluation order upon Grier's request. A defendant whose competency is in doubt cannot waive his right to a competency hearing and the issue can be raised for the first time on appeal. Medina v. California, 505 U.S. 437, 449-50, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992); Pate,

383 U.S. at 378, 384. Grier's due process right to an evidentiary hearing therefore remained intact despite her decision not to contest competency, as it was incumbent upon the court to conduct a formal hearing on its own motion. Pate, 383 U.S. at 385; Williams v. Woodford, 384 F.3d 567, 603 (9th Cir. 2004) ("state trial judge must conduct a competency hearing, regardless of whether defense counsel requests one, whenever the evidence before the judge raises a bona fide doubt about the defendant's competence to stand trial.").

Although considerable weight should be given to an attorney's opinion regarding a client's competency, such opinion alone cannot be determinative of the issue. State v. Swain, 93 Wn. App. 1, 10, 968 P.2d 412 (1998). Indeed, "counsel is not a trained mental health professional, and [her] failure to raise petitioner's competence does not establish that petitioner was competent. Nor, of course, does it mean that petitioner waived his right to a competency hearing." Odle, 238 F.3d at 1088-89 (trial court erred in not conducting evidentiary hearing even though no one questioned defendant's competence over the course of two years of pre-trial proceedings and twenty-eight days of trial). For these reasons, failure of the defense attorney to ask for a competency hearing may not be considered dispositive evidence of the defendant's competency. Id. A reason to doubt

competency does not magically disappear because the defendant no longer contests the issue. The court has an independent duty to makes its own determination of competency. Pate, 383 U.S. at 385; Williams, 384 F.3d at 603. Once the trial court determines there is a reason to doubt competency, as it did here, the court is required to hold an evidentiary hearing on the issue regardless of whether the defendant requests one. Woodford, 384 F.3d at 603. By vacating the competency order without conducting the necessary hearing, the court abandoned its ongoing duty to make an informed and independent decision regarding Grier's competency.

c. Reversal Of The Conviction Is The Only Practical Remedy.

This Court should reverse the conviction because the court's failure to adhere to adequate procedural safeguards in determining competency violated Grier's right to a fair trial. Pate, 383 U.S. at 377, 385-86; Israel, 19 Wn. App. at 776, 777-78. Remand on the competency issue is impractical at this point due to the passage of time, the absence of a contemporaneous competency report, and the otherwise total lack of an adequate record on which to base a determination that Grier was indeed competent to stand trial. Pate, 383 U.S. at 387; Drope v. Missouri, 420 U.S. 162, 183, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975).

2. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A LIMITING INSTRUCTION FOR ER 404(b) EVIDENCE.

"[A] limiting instruction *must* be given to the jury" if evidence of other crimes, wrongs, or acts is admitted. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (emphasis added). As set forth in the opening brief, the court erred in failing to issue a limiting instruction for evidence that Grier threatened her son with a gun on the night of the shooting and that Grier called her son and his girlfriend offensive names. Brief of Appellant (BOA) at 2, 30-32, 36-37.

Some courts, however, hold the failure to request a limiting instruction waives the error. See, e.g., State v. Hess, 86 Wn.2d 51, 52, 541 P.2d 1222 (1975); State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447 (1993). If this Court finds defense counsel waived the error in relation to the above-referenced evidence by failing to request a limiting instruction, then counsel's failure constitutes ineffective assistance of counsel. Counsel was further ineffective in failing to request a limiting instruction on other ER 404(b) evidence, including evidence that (1) Grier withheld her son's disability money; (2) Grier did not want her son living with her and the son lived in foster care; (3) Grier braggingly displayed her gun a week before the incident; (4) Grier fired her gun to scare someone off her

property on a previous occasion; (5) Grier believed people were in her attic and her boyfriend sent someone to rape her, at which time she confronted the would-be rapist with a gun; and (6) Grier was unemployed.[2]

Defense counsel was deficient for failing to ensure the trial court gave a proper limiting instruction that would have prevented the jury from considering Grier's bad acts as evidence of her propensity to commit crime. There was no legitimate reason not to insist on the limiting instruction given the prejudicial nature of this character evidence. Allowing the jury to convict Grier on the basis of bad character did nothing to advance her defense.

Under certain circumstances, courts have held lack of request for a limiting instruction may be legitimate trial strategy because such an instruction would have reemphasized damaging evidence to the jury. See, e.g., State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence).

The "reemphasis" theory is inapplicable here. This is not a case where a limiting instruction raised the specter of "reminding" the jury of

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[2] The opening brief sets forth the reasons why this evidence was inadmissible. BOA at 33-44.

briefly referenced evidence. This evidence permeated the proceedings. See BOA at 25-44.

The dispositive question is whether the jury used this evidence for an improper purpose in the absence of a limiting instruction. There is no reason to believe the jury did not consider evidence of other bad acts as evidence of Grier's propensity to commit the charged crime. The jury is naturally inclined to treat evidence of other bad acts in this manner. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990); see also Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002) ("Absent a request for a limiting instruction, evidence admitted as relevant for one purpose is considered relevant for others."). If that were not the case, there would never be any reason to give a limiting instruction for ER 404(b) evidence.

There is a reasonable probability the outcome of the trial would have been different had the limiting instruction been given because, as set forth in the opening brief, a mountain of character evidence prejudiced Grier's defense. See BOA at 25-46. Even if this error standing alone did not affect the outcome, there is a reasonable probability it produced an unfair outcome when considered in combination with other errors under the

cumulative error doctrine. See BOA at 44-46. Reversal of the convictions is therefore required.

D. CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse Grier's conviction.

DATED this 14th day of March, 2008.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 36350-0-II
	)	
KRISTINA GRIER,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 14TH DAY OF MARCH 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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