

85549-8

NO. 63052-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

JOHN HURST,

Appellant.

---

REVIEW SOUGHT FROM  
THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL J. FOX

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**RESPONSE TO MOTION FOR DISCRETIONARY REVIEW**

---

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STATE OF WASHINGTON  
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A. DECISIONS BELOW

Petitioner Hurst seeks review of an order committing him to Western State Hospital for restoration of competency, alleging error in three decisions of the trial court: (1) The refusal to conduct a jury trial on the competency of Hurst to stand trial; (2) The ruling that evidence that Hurst might be civilly committed was inadmissible in the jury trial as to his dangerousness and restorability; (3) The instruction to the jury as to the burden of proof regarding dangerousness and the likelihood of restoration of competency.

B. ISSUES PRESENTED

1. Whether Hurst has established grounds for the acceptance of discretionary review when this case has been dismissed in the trial court and the issues presented are moot.

2. Whether the trial court's refusal to conduct a jury trial on Hurst's competency, at his request, was probable error, when Hurst's counsel, independent counsel appointed for Hurst, a defense expert, and the State's expert all opined that Hurst was not competent, and the judge found that Hurst was not competent?

3. Whether the trial court's evidentiary ruling excluding testimony that Hurst could be subject to civil commitment proceedings was probable error.

4. Whether the trial court's instruction as to the burden of proof on dangerousness and restorability was probable error.

C. STATEMENT OF THE CASE

John Hurst was charged with one count of assault in the third degree—the State alleged that he punched a nurse in the face when she asked him to move and then told a second nurse, "I should have killed her, I made her bleed." Motion, Appendix A. Hurst told a mental health expert that someone told Hurst to kill the nurse, but that he disregarded that instruction and assaulted her instead. 2/2/09RP 4.<sup>1</sup>

Hurst was twice found incompetent to stand trial and committed to Western State Hospital (WSH) for restoration of competency. Motion, Appendices C, D. After the second

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<sup>1</sup> The verbatim report of proceedings is referenced by the date of each volume, with the exception of the two volumes for 2/3/09, which are referenced as 2/3/09A (reported by Dean) and 2/3/09B (reported by Kennedy).

commitment, WSH reported that Hurst was still incompetent to stand trial. Motion, Appendix H.

One of Hurst's trial attorneys, Devon Gibbs, requested a jury trial on the issue of the restorability of Hurst's competency.

12/16/08RP 3, 9. Gibbs stated that Hurst denied that he was incompetent and that Hurst demanded a jury trial on the issue of competency. Id. at 8. When Hurst later was given an opportunity to address the court himself, he claimed that he was competent. 1/23/09RP 14. At one point Hurst said that he wanted to explain to a jury that he did not have mental health issues, but later he appeared to be requesting a jury to consider the issue of guilt as to the charged crime. Id. at 15.

Gibbs asked the court to appoint independent counsel to assist Hurst on the issue of competency because Gibbs believed that she had a conflict of interest based on the divergence of her goals and Hurst's. 1/15/09RP 9-10. The court appointed independent counsel, Gary Davis. 1/20/09RP 11; 1/23/09RP 2. Davis concluded that there was no material issue as to competency, so a jury trial on that issue was not warranted. 1/23/09RP 10-11.

Hurst addressed the court at that point, explaining that he is an FBI agent and has implants in his ear, but that when he tells the doctors about that, they conclude that he is hearing voices and incompetent. 1/23/09RP 13-14, 18. Hurst said that he was almost ready to pay his own attorney \$100,000 to represent him but that his cash was with his wealthy godfather. Id. at 14. He continued, asserting that his godfather wanted Hurst to manage a hotel in New York City, or to manage a restaurant in Seattle, and describing in some detail the cooking equipment that would be used and his intention to put marijuana on the garlic bread. Id. at 14-15.

The court stopped Hurst at that point and concluded that Hurst was incompetent. Id. at 16-17, 22-23. It found that Hurst was not entitled to a jury trial on the issue of competence. Id.

The court conducted a jury trial pursuant to RCW 10.77.086 on the issues of Hurst's dangerousness and the likelihood that his competency could be restored. The jury found that there was a substantial likelihood that Hurst would commit criminal acts jeopardizing public safety or security and there was a substantial probability that Hurst would regain competency within a reasonable period of time. Appendix 1, Verdict Form. The next day, February

6, 2009, Hurst was returned to WSH for treatment to restore his competency. Motion, Appendix M.

On August 3, 2009, Hurst again was found incompetent to proceed and this case was dismissed without prejudice.

Appendix 2, Order Dismissing Charge.

D. ARGUMENT

1. DISCRETIONARY REVIEW SHOULD NOT BE GRANTED BECAUSE THIS CASE HAS BEEN DISMISSED BY THE TRIAL COURT.

This Court may grant discretionary review only under the four circumstances listed in RAP 2.3(b). In requesting review, Hurst relies on subsection (b)(2), which provides that review may be accepted if "[t]he superior court has committed probable error and the decision...substantially alters the status quo or substantially limits the freedom of a party to act[.]" RAP 2.3(b)(2). Both prongs of that test must be met and Hurst has established neither. Even if both prongs of the test have been satisfied, this Court should exercise its discretion and deny discretionary review because the case has been dismissed and all of the issues raised are moot.

At the time the finding of incompetency was made and the trial court ordered that Hurst be committed to WSH for further

treatment, that order substantially limited Hurst's freedom to act by delaying his arraignment and trial. State v. Swain, 93 Wn. App. 1, 8, 968 P.2d 412 (1998). Now, however, since the case against Hurst has been dismissed, the challenged rulings and order have no effect on Hurst's freedom to act.

Hurst relies solely on Swain, supra, for his assertion that his ability to act is limited, but Swain is factually distinguishable. Swain sought accelerated review of a finding of incompetency and commitment order. Id. at 3. There is no indication that the finding of incompetency no longer had any effect or that the case had been dismissed by the time the court of appeals considered the issue of discretionary review. Id. at 3, 7.

Without discussing whether the issues presented are moot, Hurst argues that the court should grant review even if it may not render a decision before the commitment period ends, because the issues presented are of substantial public interest. Motion at 20-22. The Court should not reach the mootness analysis, because Hurst has not satisfied the criteria of RAP 2.3(b)(2).

Even if the Court concludes that a basis for discretionary review exists, review should be denied because the issues are moot. As a general rule, if only moot questions are involved, the

courts of appeal will not consider the issues but will dismiss the appeal. Hart v. Dept. of Social & Health Services, 111 Wn.2d 445, 447, 759 P.2d 1206 (1988). The Supreme Court has adopted criteria to consider in deciding whether a moot issue is of continuing and substantial public interest, and thus reviewable. The three essential factors are: "(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur." Id. at 448. The court has emphasized that courts should rigorously examine and apply these criteria "to ensure that an actual benefit to the public interest in reviewing a moot case outweighs the harm from an essentially advisory opinion." Id. at 450.

The evidentiary error alleged meets none of these criteria, as it is not an issue of public interest and there can be no authoritative determination of future evidentiary rulings. An incompetent defendant, over his attorney's objection, making a statutory demand for a jury trial as to competence after two previous commitments does not create an issue of substantial public interest; moreover, the situation is unlikely to recur. While the issue of the applicable burden of proof is of public interest, RCW 10.77.086 sets a

standard of proof, and Hurst has cited no cases rejecting that standard in the context of felony prosecution. The argument that constitutional due process requires a clear and convincing evidence standard does not demand an immediate authoritative resolution; the invocation of a due process argument does not convert this argument into a matter of substantial public interest.

2. HURST HAS NOT ESTABLISHED PROBABLE ERROR WARRANTING DISCRETIONARY REVIEW.

While Hurst argues that the trial court erred in three rulings, he has not met the RAP 2.3(b)(2) standard of probable error with respect to any of them.

a. Hurst's Request For A Jury Trial As To Competency Was Properly Denied Because His Incompetency Was Undisputed.

Hurst challenges the trial court's ruling refusing his personal request for a jury trial on the issue of competency, when competency was not in dispute. Hurst has not established that the ruling was probable error. His argument that an incompetent defendant has an absolute statutory right to a jury trial on competency based on RCW 10.77.086, despite his counsel's

agreement that he is incompetent, is inconsistent with existing law relating to the decisions of incompetent defendants and is unsupported by authority.

The State acknowledges that the grant of the right to a jury trial in RCW 10.77.086 specifically relates to the issues of competency and restorability at the end of a second 90-day commitment for restoration, which was the procedural posture here. RCW 10.77.086(3), (4). However, the statute does not confer on the defendant the statutory right to demand a jury trial on an issue that is not in dispute.

The plain meaning of a statute is determined based on the language at issue, the context of the statute, related provisions, and the statutory scheme as a whole. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). Adopting the interpretation proposed by Hurst does not make sense in light of the statutory scheme as a whole. It would be an absurd waste of judicial and jury resources to afford a jury trial on an undisputed issue, as it could result in a defendant who was without question incompetent obtaining a meaningless jury trial without even understanding what a jury trial is. The defendant could demand a jury trial, proclaiming his competence, even if the State's intent was to dismiss the case

based on experts finding the defendant incompetent. That surely was not the legislative intent in establishing this statutory jury trial procedure.

If RCW 10.77.086 were interpreted to require a court to act on the wishes of an incompetent defendant, contrary to the position or strategy adopted by his or her attorney, that interpretation would be a violation of due process and the right to counsel. State v. Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001), recognizes the constitutional right to be competent when being tried, convicted, or sentenced. Chapter 10.77 itself recognizes that an incompetent defendant cannot personally participate in pretrial proceedings. RCW 10.77.084(1)(a), (4). The Washington Supreme Court has recognized that, at a minimum, a defendant must be competent to make intelligent and voluntary decisions about the course of criminal proceedings. State v. Hahn, 106 Wn.2d 885, 891-92, 726 P.2d 25 (1986). The legislature did not intend that an incompetent defendant direct the proceedings.

Moreover, Hurst was represented by counsel in this case. A defendant who is incompetent is not permitted to waive the right to counsel. RCW 10.77.020(1); Hahn, 106 Wn.2d at 893; see Indiana v. Edwards, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2379, 2383-88, 171

L. Ed. 2d 345 (2008) (states may adopt a standard higher than competency to stand trial in determining competency to waive counsel). Matters of strategy generally are in the hands of counsel. State v. Cross, 156 Wn.2d 580, 606, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006). Counsel did not seek a statutory jury trial on the issue of competency and that tactical decision was for counsel to make, not Hurst.

Hurst has not established probable error in the trial court's statutory interpretation or in its conclusion that competency was not in dispute. Two mental health professionals concluded that Hurst was incompetent—a defense expert as well as a psychologist at WSH. 2/3/09RP 19-20, 26; 2/4/09RP 56-58. In addition, two independently appointed defense attorneys concluded that there was no dispute – Hurst was incompetent. 1/15/09RP 5; 1/23/09RP 4-5.

b. The Trial Court's Evidentiary Ruling Was Not Probable Error.

Hurst challenges the trial court's evidentiary ruling that he would not be permitted to present evidence relating to the possibility that he could be civilly committed if the jury returned a

verdict that his competency was not restorable. This is an evidentiary ruling, so it is error only if it is a manifest abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Discretion is abused only if its exercise is manifestly unreasonable or is based on untenable grounds or reasons. Id. Because this information had no relevance to the issues being determined by the jury, Hurst has not shown that it was probable error to exclude it.

Further, the expert witnesses at trial testified that there were at least four prior occasions on which Hurst was civilly committed because of mental problems. 2/3/09ARP 89, 92; 2/4/09RP 112. Dr. Peter Bingcang testified that on a prior occasion, after Hurst was evaluated for competency in a criminal case, he was civilly committed. 2/4/09RP 112. As a result of this testimony, the jury knew that there was a possibility that Hurst could be civilly committed after a criminal case was closed.

Hurst's argument on this point is primarily an argument that the State committed prosecutorial misconduct in its closing argument, appealing to fear of and sympathy for Hurst. He cites two instances in support of that proposition, but Hurst did not object to either of those arguments when they were made below.

2/5/09RP 6-7, 22. After the end of all arguments, Hurst asked the court to repeat the instruction that it already had given. Id. at 56-57. Hurst cites no authority for the proposition that refusal to repeat an instruction is error.

c. The Court Applied The Proper Standard Of Proof As To Dangerousness And The Likelihood Of Restorability Of Competency.

Hurst challenges the trial court's conclusion that the standard of proof applicable to dangerousness and restorability is a preponderance of the evidence. Hurst has not shown that the trial court's conclusion was probable error.

Hurst cites no cases addressing the burden of proof on competency restoration issues in a felony case. He cites cases adopting higher standards of proof relating to involuntary civil commitment,<sup>2</sup> cases involving deprivation of parental rights,<sup>3</sup> and the statutory standard of proof for civil commitment of sexually violent predators.<sup>4</sup> As the liberty interests and the State's interests

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<sup>2</sup> Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); In re McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984).

<sup>3</sup> Motion at p. 18.

<sup>4</sup> RCW 71.09.060.

in each of those situations are substantially different than in a felony prosecution, these cases are not analogous.

Hurst acknowledges that RCW 10.77.086(3) establishes the burden of proof as a preponderance of the evidence for competency determinations in felony cases after the first 90-day restoration period, but claims that due process analysis requires a higher standard after the second 90-day restoration period. That contention is without support and the trial court did not commit probable error in applying the preponderance burden of proof.

Hurst's reliance on Born v. Thompson, 154 Wn.2d 749, 117 P.3d 1098 (2005), is misplaced. Born analyzed the appropriate burden of proof relating to commitment for restoration of competency of persons charged with misdemeanor offenses. Id. at 751. Born analyzed at length the difference between the State's interest in prosecuting felonies and in prosecuting misdemeanors. Id. at 756-57. It recognized that the burden of proof in the felony context was established by statute as a preponderance of the evidence. Id. 757 and n.10. The court concluded that a higher standard of proof should apply in the misdemeanor context,

because the government has a less important interest in prosecuting misdemeanor crimes than felonies. Id. at 756.

Hurst attempts to minimize the State's interest in public safety in this case. He argues that the charge is little more than a misdemeanor. Hurst does not contend that this case was not properly charged as a felony, he simply notes that only one element (the status of the victim as a nurse) distinguishes it from a misdemeanor. Nevertheless, it is the legislature's prerogative to determine the seriousness of crimes, and it is certainly common for only one element to distinguish a misdemeanor from a felony. In any event, Hurst proposes a standard of proof that would apply to all felonies, up to and including murder.

In addition, although the nurse who was the object of the unprovoked attack in this case was not seriously injured, Hurst clearly does pose a danger to the community. With respect to the charged incident, Hurst told a mental health expert that someone told Hurst to kill the nurse, but that he disregarded that instruction and assaulted her instead. 2/2/09RP 4. Hurst told another nurse that "I should have killed her." Motion, Appendix A.

Hurst also has a history of other violent acts, as shown in the third page of the charging document, which was not included with the first two pages of the charging document in Appendix A of Hurst's motion. Appendix 3 (Prosecuting Attorney Summary and Request For Bail). Hurst has seven convictions for assault in Washington State since 1999 and two convictions for assaults on officers in Nebraska in 1995 and 1996. Id. Hurst has additional convictions for harassment (in 2003), malicious mischief (in 2004 and 1996) and property destruction (in 2004, 2003, and 2000). Id. He was under the supervision of the Department of Corrections at the time of this assault. Id.

The legislature has specifically provided the standard of proof to be applied to competency determinations in felony cases. Hurst cites no case indicating that the standard specified, the preponderance standard, is constitutionally inadequate for felony prosecutions. Hurst has not shown probable error in the trial court's application of that standard below.

E. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to deny the motion for discretionary review.

DATED this 17<sup>TH</sup> day of August, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: Donna L. Wise  
DONNA L. WISE, WSBA #13224  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

# **Appendix 1**

# **Appendix 1**

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

**FILED**  
KING COUNTY, WASHINGTON

FEB 05 2009

STATE OF WASHINGTON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JOHN ROBERT HURST )  
 )  
 Defendant. )

No. 08-1-03298-8 SEA  
VERDICT FORM

SUPERIOR COURT CLERK  
BY: ~~D. GOLF~~ *Anna C. Smart* DEPUTY

We, the jury, make the following findings:

(1) Does the defendant present a substantial danger to other persons?

Answer: NO ("yes" or "no").

(2) Is there a substantial likelihood that the defendant will commit criminal acts jeopardizing public safety or security?

Answer: YES ("yes" or "no").

If your answer to EITHER (1) or (2) is "yes," then consider and answer the following question:

(3) Is there a substantial probability that the defendant will regain competency within a reasonable period of time?

Answer: YES ("yes" or "no").

2/5/09  
Date

*Ag. D. D. D.*  
Presiding Juror

# **Appendix 2**

# **Appendix 2**

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KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

7 CERTIFIED COPY TO WARRANTS AUG 03 2009

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, )

Plaintiff, )

No. 08-1-03298-8 SEA

vs. )

JOHN HURST, )

Defendant. )

) FINDINGS OF FACT,  
) CONCLUSIONS OF LAW, ORDER  
) DISMISSING CRIMINAL CHARGES  
) WITHOUT PREJUDICE,  
) COMMITMENT FOR EVALUATION,  
) AND ORDER OF  
) TRANSPORTATION

I. HEARING

1.1 Date. July 31, 2009

1.2 Judge. The Honorable ARMSTRONG

1.3 Appearance. The plaintiff appeared by Daniel T. Satterberg, Prosecuting Attorney, Prosecuting Attorney for King County, by and through his deputy, Cindi Port

The defendant appeared in person and by his attorney, RICK LICHTENSTADTER

FINDINGS OF FACT, CONCLUSIONS OF LAW,  
ORDER DISMISSING CRIMINAL CHARGES  
WITHOUT PREJUDICE, COMMITMENT FOR  
EVALUATION, AND ORDER OF  
TRANSPORTATION - 1

ORIGINAL

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# **Appendix 3**

# **Appendix 3**

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8 CAUSE NO. 08-1-03298-8 SEA

9 PROSECUTING ATTORNEY CASE SUMMARY AND REQUEST FOR BAIL AND/OR  
10 CONDITIONS OF RELEASE

11 The State incorporates herein by reference the Certification for Determination of  
12 Probable Cause prepared by Detective Timothy DeVore of the Police Department under incident  
13 number 08-091494.

14 REQUEST FOR BAIL

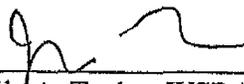
15 Pursuant to CrR 2.2(b)(2)(ii), the State requests bail be set at \$5,000, based on the  
16 likelihood that the defendant will commit a violent offense. This is based on the nature of the  
17 charged crime and the defendant's criminal history, which includes an extensive history of  
18 assaultive behavior. In addition the defendant was under DOC supervision when he is alleged to  
19 have committed this offence.

20 As of March 13, 2008 the defendant has the following Washington State criminal history:  
21 VUCSA - Possession of Cocaine (2007), Attempted Malicious Mischief 2° (2006), Assault 4°  
22 (2007, 2005, 2004-two counts, 2003, 2002, 1999), FTR (2006), Criminal Trespass 2° (2004,  
23 2003, 1998), Property Destruction (2004, 2003, 2000), Malicious Mischief 3° (2004), Theft 3°  
(2004, 2001, 2000, 1999-two counts), Criminal Trespass 1° (2004, 2002, 1999, 1998), Resisting  
Arrest (2003, 1998), Harassment (2003), Disorderly Conduct (1999-two counts), Possession of  
Drug Paraphernalia (1998) and DUI (1998).

In addition the defendant has the following Nebraska criminal history: Assault Officer 3°  
(1996), Assault-Correction Officer (1995), Disturbing the Peace (1992), Obstruct a Police  
Officer (1994) and Criminal Mischief (1996).

As a condition of any release pending trial, the State requests that the defendant have no  
contact with the victim, Janet Ortis.

Signed this 20th day of March, 2008.

  
\_\_\_\_\_  
Jamila A. Taylor, WSBA #32177

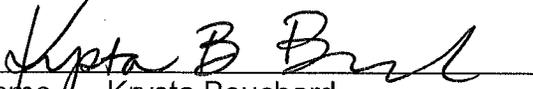
Prosecuting Attorney Case  
Summary and Request for Bail  
and/or Conditions of Release - 1

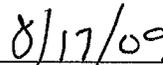
Daniel T. Satterberg, Prosecuting Attorney  
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Certificate of Personal Service

Today I personally delivered an envelope directed to Mindy Ater, the attorney for the appellant, to Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Response to Motion for Discretionary Review, in STATE V. JOHN HURST, Cause No. 63052-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
Name - Krysta Bouchard  
Done in Seattle, Washington

  
Date - August 17, 2009