

FILED
Court of Appeals
Division III
State of Washington
1/19/2018 12:13 PM
34859-8-III
(Consolidated with 34863-6-III)

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MATTHEW MCCARTHY, APPELLANT

IN RE PERSONAL RESTRAINT PETITION OF:

MATTHEW MCCARTHY, PETITIONER

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. SUMMARY

Matthew McCarthy might be delusional, but he was competent to stand trial. Mr. McCarthy has a variety of beliefs and perceptions that are only weakly based in fact. Appellate counsel¹ points to some of these and asserts that Mr. McCarthy was clearly suffering from mental health issues and the trial judge should have questioned his competency. And this is true. It happened. Mr. McCarthy was subject to multiple competency evaluations and extensive psychiatric care to ensure that he was competent to stand trial. The question was put to a jury, who found Mr. McCarthy competent.

After those proceedings, Mr. McCarthy maintained some of his spurious beliefs, but the record indicates that he understood the proceedings, that he understood the accusations, and that he actively and meaningfully engaged in his own defense. There is nothing in the record indicating a deterioration in Mr. McCarthy's condition, nor anything to undercut the jury's earlier finding of competence. Consequently, the trial court judge

¹ In his Statement of Additional Grounds, Mr. McCarthy steadfastly asserts his own competency, and states dissatisfaction with appellate counsel for raising this issue. It seems unfair to impute an argument on Mr. McCarthy that he expressly disavows. Consequently, the State's brief will refer to this argument as being made by counsel rather than the Appellant.

correctly refrained from raising further questions about Mr. McCarthy's competence.

In the consolidated personal restraint petition (PRP), Mr. McCarthy makes a variety of assertions that distill into two factual arguments: an assertion that police officers falsified reports, and an assertion that jail personnel abused Mr. McCarthy during the pendency of this case. Both of these assertions are made without the support of any evidence beyond bare allegations, and consequently cannot support relief on a PRP.

II. ISSUES PRESENTED

1. Whether the trial court should have questioned Mr. McCarthy's competence despite prior resolution of that issue?
2. Whether Mr. McCarthy has presented a sufficient basis for relief on a PRP?
 - a. Whether police manufactured evidence against Mr. McCarthy?
 - b. Whether jail personnel used noxious gas against Mr. McCarthy?

III. STATEMENT OF THE CASE

On September 21st, 2014, Kayla Hierholzer² was at home with her two-year-old daughter in Spokane. Whitstock RP 48-49.³ When she

² Ms. Hierholzer appears in some of the police reports by her maiden name Gonzalez, which is also used by Mr. McCarthy in his briefing on the PRP.

³ The reports of proceedings are contained in five separately paginated sets of volumes that overlap chronologically. Each set of volumes contains

answered a knock at the door, she was confronted by Matthew McCarthy. *Id.* at 51-52. Mr. McCarthy asked for someone named Ellie, and Ms. Hierholzer told him that she did not know anyone by that name and he had the wrong place. *Id.* at 53. A brief argument ensued, and Ms. Hierholzer attempted to close the door. *Id.* Mr. McCarthy blocked her, forced the door open and came into her home. *Id.* at 54. As the door opened, he pushed her back against the wall, and Ms. Hierholzer lost her phone. *Id.* at 55-56. She fled into the bedroom where her daughter was and closed the door. *Id.* Once she no longer heard noises from the front room, she came out and Mr. McCarthy was gone. *Id.* at 56-57.

The next day, Mr. McCarthy returned, this time looking for Laura, but was turned away by Cory Hierholzer and Coty Hierholzer. *Id.* at 85. Mr. McCarthy believed that the Hierholzers had some connection to his ex-wife, Laura. *Id.* at 157-60. Mr. McCarthy was subsequently arrested and charged with first degree burglary. CP 6.

Following his arrest, Mr. McCarthy was referred for a competency evaluation. There, Dr. Lord-Flynn noted that Mr. McCarthy was capable of in depth discussions regarding all variety of the legal proceedings against

multiple proceedings that were transcribed by one court reporter. Throughout this brief, the State will reference the RP by indicating which court reporter prepared the pertinent volume.

him. CP 447-53. They had considerable discussions about his beliefs that the victim was part of an elaborate conspiracy. CP 452. Despite those beliefs, he was able to acknowledge that he had no proof of anything, that allegations alone would not carry much weight, and that he would consider these shortcomings in making decisions on the case. *Id.* However, further information from his then-attorney, Kari Reardon, indicated that he was no longer able to give consideration to the lack of proof for his beliefs. CP 452. Upset with what he believed to be a violation of attorney-client privilege, Mr. McCarthy then refused to engage with Dr. Lord-Flynn and demanded an immediate trial. *Id.* Dr. Lord-Flynn came to the conclusion that Mr. McCarthy understood the nature of the proceedings, but that he could not make rational decisions. CP 452.

While undergoing restoration, Mr. McCarthy sent numerous letters to Ms. Reardon, asserting that he was competent and asking her to obtain a second opinion. Whitstock RP 6. Because she believed that Mr. McCarthy was not competent, she did not do so. *Id.* at 6. Ms. Reardon eventually did obtain a second opinion following communication from the court. *Id.* Ms. Reardon sought an opinion from Dr. Debra Brown, who also concluded that Mr. McCarthy was not competent to stand trial. *See* Report of Dr. Brown, CP 161-167. Much of Dr. Brown's assessment hinged on Mr. McCarthy's "paranoia" concerning his attorney, Ms. Reardon. CP 167.

Following Mr. McCarthy's competency restoration, Dr. Lord-Flynn determined that he was competent. *See* March 16, 2015 Report, CP 296-302. At that time, Dr. Lord-Flynn also believed he no longer exhibited signs of delusional beliefs. CP 300-1. While Mr. McCarthy continued to express concerns about his current attorney, Dr. Lord-Flynn believed that Mr. McCarthy was capable of rationally assisting his defense. *Id.* At a first contested competency hearing, Ms. Reardon presented Dr. Brown's evaluation against Dr. Lord-Flynn's more recent evaluation to argue that Mr. McCarthy remained incompetent. *See* Whitstock RP 1-15. The trial court considered this evidence and ordered a second 90-day stay to further restore competence. *Id.* at 16-17.

At the end of the second 90-day period, Dr. Lord-Flynn again evaluated Mr. McCarthy, with Dr. Brown present. CP 457. Dr. Lord-Flynn reported his interactions with Mr. McCarthy, as well as his observations, and arrived at the conclusion that Mr. McCarthy was competent to stand trial. CP 460-65. Defense counsel opposed this finding, and the matter proceeded to a jury trial on competence.

At the competency trial, Mr. McCarthy continued to maintain that he was competent, although he agreed that there was probably reason to question that at the start of his case. Kerbs RP 347-48. He also testified about his mental health, and what happens when he fails to take

medications. *Id.* at 350-52. Finally, he detailed the collapse of his working relationship with his attorney, including her unauthorized disclosure of privileged information. *Id.* at 350-59. Following Mr. McCarthy's testimony, both doctors testified to their opinions, and the jury found Mr. McCarthy competent to stand trial. *Id.* at 373-415 (Dr. Brown's opinion), 515-64 (Dr. Lord-Flynn's opinion), 688 (verdict).

Immediately following the trial, Kari Reardon withdrew as counsel. *Id.* at 692. Mr. McCarthy then moved the court to proceed pro se, and Dennis Dressler was appointed as standby counsel. *Id.* at 700, 711-12. Following various motions, and prior to trial, Mr. Dressler returned to actively represent Mr. McCarthy as counsel. Cochran RP 100. The matter proceeded to trial and the jury convicted Mr. McCarthy of first-degree burglary. Whitstock RP 256.

IV. ARGUMENT

A. COMPETENCY TO STAND TRIAL

This court will ordinarily defer to the trial court's judgment on a defendant's mental competency. *State v. Ortiz*, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985). Chapter 10.77 governs the procedures and standards used to determine whether an individual is competent to stand trial. *State v. Wicklund*, 96 Wn.2d 798, 801, 638 P.2d 1241 (1982). A defendant is incompetent when they lack the capacity to understand the nature of the

proceedings against them or they lack the capacity to assist in their own defense. RCW 10.77.010(15). Whenever there is reason to doubt the defendant's competency, the court shall designate a qualified mental health professional to evaluate the mental condition of the defendant. RCW 10.77.060(1)(a).

If the court finds the defendant incompetent, the court may commit the defendant to be restored for 90 days. RCW 10.77.086. Following the second such commitment, if there is still a question of competence, the defendant is entitled to a trial by jury on the question of competence. RCW 10.77.086(3). At such a trial, the defendant is presumed competent, and the defense bears the burden of establishing incompetence by a preponderance. *State v. Coley*, 180 Wn.2d 543, 552-55, 326 P.3d 702 (2014).

Here, those procedures were followed. Mr. McCarthy was initially evaluated and found incompetent. Following the 90-day restoration, the original examiner found him competent, but a second examiner retained by defense counsel found him incompetent, and the court ordered a second 90-day restoration. Following that, the court held a trial, and heard competing testimony by the experts, and a jury found Mr. McCarthy competent. No one has challenged the propriety or validity of that process.

Following the competency trial, Mr. McCarthy began representing himself. He then brought a variety of motions, including those that appellate counsel now points to in support of the argument that the court should have questioned Mr. McCarthy's competence again. However, at that time, the State brought up the potentiality that Mr. McCarthy's delusions were resurfacing and could be affecting his decisions. Kerbs RP 715. The trial court considered this, but indicated that Mr. McCarthy was no different than he had been during the competency hearing. Kerbs RP 716. The court explicitly noted Mr. McCarthy's understanding of the procedures and trial preparation. *Id.*

Now, on appeal, counsel argues that the trial court should have halted proceedings at that stage, and restarted the entire competency process. To make this argument, counsel relies upon incidents where there was clear, clinical evidence that called into question the competence of a defendant, but the trial court failed to initiate proceedings under RCW 10.77. *See State v. Marshall*, 144 Wn.2d 266, 27 P.3d 192 (2001); *see also* Br. of Appellant at 11, discussing an uncited, unpublished opinion in *State v. Lawrence*. Due process rights are infringed when a court fails to observe procedures adequate to protect the rights of the accused. *See State v. O'Neal*, 23 Wn. App. 899, 901, 600 P.2d 570 (1979). Here, there was clear evidence calling into question Mr. McCarthy's competence, and the

procedures under RCW 10.77 were executed to assess and address that issue. There are no further legal requirements to ensure that Mr. McCarthy is competent.

Fundamentally, though, counsel's argument boils down to an assertion that Mr. McCarthy is clearly delusional, so he is probably incompetent. But, this is not the standard for competence. "Competency" does not require that someone adheres strictly to logic and reason. A competent person can still act irrationally or believe in the truth of something unsupported by evidence. We do not brand people who believed the earth is flat incompetent simply because they believe in the truth of something they can never prove in court.

Rather, the question is whether a defendant understands the nature of the charges against him and is capable of assisting in his defense. RCW 10.77.010(15). There has never been any question about Mr. McCarthy's understanding of the proceedings. He has always exhibited an intelligent understanding of complex legal issues. *See* CP 299, 451-52. The question has been whether his beliefs affect his capacity to assist in his defense. *Id.* This was the issue litigated in the competency trial, where defense counsel sought to prove that Mr. McCarthy was not competent to stand trial.

Once again, this Court will ordinarily defer to the trial court's judgement of a defendant's mental competency. *Ortiz*, 104 Wn.2d at 482. Here, the trial court engaged in the required procedures to ensure that Mr. McCarthy was competent. The court ordered an evaluation followed by 180 days of restorative treatment, and a competency trial. Mr. McCarthy's due process rights were observed. Neither he, nor counsel, assigns any error to those proceedings. There is no intervening clinical evidence controverting the results of those proceedings. Additionally, the trial court remained cognizant of Mr. McCarthy's continuing mental health issues. Neither the trial court nor defense counsel further questioned Mr. McCarthy's competence. This Court should not second guess that judgment.

B. STANDARD OF REVIEW ON PRP

To obtain relief on a PRP, the petitioner must show that he was actually prejudiced by a violation of his constitutional rights or by a fundamental error of law. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 810, 792 P.2d 506 (1994). Bare, unsupported allegations are insufficient to merit relief. *State v. Coombes*, 191 Wn. App. 241, 255-56, 361 P.3d 270 (2015).

C. ASSERTIONS OF PERJURY

Mr. McCarthy asserts that police falsified records, and that the victim, Ms. Hierholzer, perjured herself on the stand. However, he points to no evidence to support this allegation. His argument seems to hinge on one minor discrepancy between the reports and Ms. Hierholzer's testimony: when she lost her phone. According to the reports, she stated that Mr. McCarthy slapped the phone out of her hands. CP 3. She then apparently told defense counsel in an interview that in fact the door hit her and knocked the phone out of her hands. Whitstock RP 79. At trial, Ms. Hierholzer could not remember how she lost the phone, nor her statement to defense counsel. *Id.* at 55, 79. She testified that she lost it at some point but could not remember whether it was knocked out of her hand by the door or by Mr. McCarthy. *Id.* at 56. This is hardly perjury, but rather evidences a hazy memory on one minor detail. There is no evidence of any false testimony, or falsified record on that point.

Mr. McCarthy additionally points to police reports outside the record. Apparently, the same police officers responded to Ms. Hierholzer's report of an unrelated domestic violence incident involving Mr. McCarthy's ex-wife. *See* Memorandum of Authorities attached to PRP. Mr. McCarthy asserts that this is evidence of a conspiracy between the police and his ex-wife. He asserts that further evidence exists and should have been presented

at trial, but has not presented any of that evidence here. Because Mr. McCarthy's assertions lack any factual support, this Court should deny him relief on the PRP.

D. ASSERTIONS OF ABUSE

Mr. McCarthy reiterates a number of unsupported allegations of various abuses by jail personnel during the pendency of this case. It is not entirely clear how this is at all related to the conviction that he currently challenges. Even if he were mistreated by jail personnel, such mistreatment would not impact his trial or subsequent conviction. For these reasons, the habeas petition submitted to the superior court involved counsel for detention services instead of the prosecutor. *See Cochran RP 33.*

In any event, Mr. McCarthy seems primarily focused on the trial court's refusal to address these issues in the habeas petition. On that score, he may have a valid procedural complaint. The trial court entertained Mr. McCarthy's habeas petition, and heard from detention services. *See Cochran RP 116-131.* The court reserved ruling on the issue at that time. *Id.* at 130. However, there does not appear to be any order in the record resolving those issues. Even though the habeas petitions lacked evidentiary support, the trial court should at least rule on them.

V. CONCLUSION

After substantial process, Mr. McCarthy was found competent to stand trial. The trial court had no obligation to restart that process without clear evidence that Mr. McCarthy did not remain competent.

Dated this 19 day of January, 2018.

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MATTHEW S. MCCARTHY,

Appellant,

In Re Personal Restraint of:

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Petitioner.

NO. 34859-8-III
Consol w/34863-6-III

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SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on January 19, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

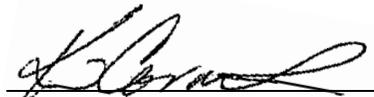
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