

63906-4

63906-4

NO. 63906-4-I
Corrected copy

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RUSSELL HOHF,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

Far in advance of his trial, Russell Hohf decided that he wanted to represent himself. Rather than considering this request, the court held a competency hearing at which one of Hohf's appointed attorneys urged the court to find Hohf incompetent and forcibly medicate him due to his inability to get along with his lawyers. The court concluded that even though Hohf understood the proceedings against him, his failure to assist his attorneys in preparing a defense rendered him incompetent to stand trial. The court ordered the State to forcibly medicate Hohf until his competency was "restored," i.e., until he assisted his lawyers.

The court's refusal to consider Hohf's request to represent himself was contrary to RCW 10.77.020(1), which allows a person to represent himself even in competency proceedings, as well as the state and federal constitutional rights to self-representation. Furthermore, the court misapplied the standard for finding someone incompetent to stand trial and used the wrong standard of proof in ruling the State could forcibly medicate Hohf.

B. ASSIGNMENTS OF ERROR.

1. The court improperly ordered that Hohf submit to forcibly administered antipsychotic drugs contrary to his rights to liberty, privacy, and due process of law as protected by the state and federal constitutions.

2. The court misapplied the legal standard for determining when a person is competent to stand trial by finding Hohf incompetent solely because he did not wish to assist his attorneys.

3. The court improperly denied Hohf his right to represent himself under the Sixth and Fourteenth Amendments and Article I, section 22 of the Washington Constitution.

4. The court's Finding of Fact 2.2, justifying its finding the Hohf was incompetent to stand trial, is not supported by substantial evidence.¹

5. The court's Finding of Fact 2.6, justifying its forced medication order is not supported by substantial evidence or proven by clear, cogent and convincing evidence.

6. The court's Finding of Fact 2.7, justifying its forced medication order is not supported by substantial evidence or proven by clear, cogent and convincing evidence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Forcing a person accused of a crime to submit to involuntarily administered antipsychotic medications is a massive intrusion upon the person's liberty and privacy, and potentially impairs the accused's right to a fair trial due to side effects of the medication. The State may not forcibly administer antipsychotic medications to an accused person unless it proves by clear and convincing evidence that such medications are necessary and substantially likely to render the accused competent to stand trial. The trial court used a preponderance standard, rather than holding the State to its burden of proof by clear and convincing evidence. Where the court conceded the evidence favoring forced medications was slim and it applied an improperly lenient standard of proof, did its order requiring Hohf to submit to forced medications violate Hohf's rights to liberty, privacy, and a fair trial untainted by unwanted medications?

2. In Washington, all persons accused of a crime are entitled to represent themselves, even in competency proceedings. Hohf asked to represent himself but the court refused to consider that request until it first decided whether he was competent to

¹ The findings of fact and conclusions of law are attached as Appendix

stand trial. Because RCW 10.77.020(1) requires a court to let a person proceed *pro se* even during competency proceedings, did the court impermissibly denied Hohf his right of self-representation?

3. Although both the state and federal constitutions allow a person to waive counsel, Washington's protection for the right of self-representation is broader than under the federal constitution. The court found Hohf incompetent to stand trial solely because he did not assist his attorneys in preparing a defense even though Hohf asked to represent himself. Where Hohf understood the proceedings against him and expressed a clear desire to represent himself, did the court's refusal to consider this request deny him his right to proceed *pro se*?

D. STATEMENT OF THE CASE.

Russell Hohf hired a lawyer soon after his arrest for the charge of first degree assault while armed with a firearm, feeling he would be better off with an attorney he hired than the assigned attorney from the public defender's office. 11/12/08RP 137; CP 197. Not long after retaining counsel, the attorney withdrew due to a breakdown in communication and Hohf said he would represent

A.

himself. 1/17/08RP 8. The trial judge told Hohf, “you have to find yourself another lawyer.” 1/17/08RP 8, 9, 11. Hohf asked to represent himself again at the next hearing, saying, “I am more than willing to represent myself and that’s my plan. I have my own rights.” 1/24/08RP 3. The court suggested Hohf seek other representation but allowed him to proceed *pro se* for the time being. 1/24/08RP 4, 8, 9; 2/14/08RP 3; CP 194.

The court appointed Kelly Armstrong-Smith to represent Hohf, although upon her appointment Hohf told the court, “I’m still *pro se*. . . she is assisting me.” 2/12/08RP 2. Armstrong-Smith agreed that Hohf, “really wants to represent himself, with me as stand-by.” *Id.* at 2-3. The court told Hohf that Armstrong-Smith would represent him and it would not entertain “additional requests today.” *Id.*

At this hearing, Armstrong-Smith said she would talk with Hohf to see if the court should “send him to Western State” for a competency evaluation. 2/14/08RP 6. Shortly thereafter, the court sent Hohf to Western State Hospital for a competency evaluation. Supp. CP __, sub. no. 63; CP 136-38. The court rejected Hohf’s request that he obtain a psychiatric evaluation in the community and raised Hohf’s bail to one million dollars, thus revoking Hohf’s

out of custody status and resulting in his confinement for the rest of the case. 10/14/08RP 14-15; Supp. CP __, sub. no. 63; Supp. CP __, sub. no. 62 (*pro se* request for out of custody evaluation).

Armstrong-Smith's speculation that Hohf was incompetent did not endear her to Hohf, as Hohf believed he was competent and wished to prepare for trial. Hohf declared Armstrong-Smith was no longer his lawyer, explained that he understood the charges and sentence, and again stated his desire to represent himself. 10/14/08RP 10-11; see also CP 175 (Motion Showing Defendant Acting Pro Se); CP 172 (Hohf's letter to court, "I have the constitutional right to represent myself; which I am doing."). When Armstrong-Smith told Hohf not to talk about the facts of the case, Hohf told her, "you have been dismissed." 10/14/08RP 19.

Rather than considering whether Hohf could represent himself, the court scheduled a competency hearing. The court insisted that "competency" was a necessary threshold determination before it could consider Hohf's request to represent himself. 10/14/08RP 4, 20. The court appointed a second attorney as co-counsel because Armstrong-Smith had declared her belief that Hohf was not competent, against Hohf's wishes. Id. at 24, 27.

At a combined competency/forced medication hearing, the two testifying experts agreed Hohf understood the nature of the proceedings. 11/12/08RP 57 (no concern about Hohf's "understanding of relevant legal issues"); 11/12/08RP 89 (Hohf "absolutely understands the court proceedings. He understands the charges. He understands the legal peril."). Both said Hohf was not consistently cooperating with his attorneys. *Id.* at 58, 89. The State's expert, Dr. Roman Gleyzer, diagnosed Hohf with a delusional disorder, while defense expert Dr. Kenneth Muscatel diagnosed Hohf with a paranoid personality disorder. *Id.* at 52, 89. Gleyzer favored antipsychotic medications to improve Hohf's disposition toward his attorneys, although he conceded there was limited evidence that these medications could effectively treat Hohf's disorder. Muscatel was unsure whether antipsychotic medications would help Hohf and noted they are not typically used to treat personality disorders. *Id.* at 98.

The court found Hohf understood the proceedings against him but was not communicating with his attorneys. CP 131. Even though there was slim scientific evidence that antipsychotic medications could benefit Hohf, the court ordered Hohf be forcibly medicated. CP 131-32.

After several months of continued custody and forced antipsychotic medications, Hohf agreed to work with his lawyers and asked to be relieved of the burden of forced medications, but the court refused. 2/10/09RP 168; 2/18/09RP 171; 2/28/09RP 182. He complained of excessive drool and slurred speech. 2/18/09RP 171. The court insisted that Hohf remain forcibly medicated throughout the remainder of the proceedings. 2/28/09RP 187.

At his jury trial, during which Hohf received forced medications and was represented by Armstrong-Smith and co-counsel Charles Markwell, Hohf testified that he acted in self-defense. 7/9/09RP 24-29. He was convicted of the charged offense, received a standard range sentence, and timely appeals. CP 16-21.

E. ARGUMENT.

1. THE COURT APPLIED THE WRONG STANDARD OF PROOF WHEN IT FOUND THAT HOHF MUST SUBMIT TO FORCIBLY ADMINISTERED ANTIPSYCHOTIC MEDICATIONS

- a. The necessity of forced antipsychotic drugs must be proven by clear, cogent, and convincing evidence. All persons accused of a crime possess “a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs.” Washington

v. Harper, 494 U.S. 210, 221-22, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990); U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 7.

Involuntary medications may interfere with an individual's right to privacy as well as the right to a fair trial free of influences and side effects caused by antipsychotic medications. Riggins v. Nevada, 504 U.S. 127, 137, 112 S.Ct. 810, 118 L.Ed.2d 479 (1992); State v. Adams, 77 Wn.App. 50, 55, 888 P.2d 1207, rev. denied, 126 Wn.2d 1016 (1995); U.S. Const. amends. 5, 6, 14; Wash. Const. art. I, §§ 3, 7, 22.

As the Riggins Court noted, the side effects of forced medications may impact "not just Riggins' outward appearance, but also the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel." Id. at 137. Consequently, the record had to show "that administration of antipsychotic medication was necessary to accomplish an essential state policy." Id. at 138.

The involuntary administration of drugs "solely for trial competence" purposes may occur only in "rare" instances. Sell v. United States, 539 U.S. 166, 180, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003). In Sell, the court ruled that the rare instance when forced medication is permitted for purposes of trial competence arises

only after the State has proven: (1) “that important government interests are at stake”; (2) “that involuntary medication will significantly further those concomitant state interests”; (3) “that involuntary medication is necessary to further those interests”; and (4) “that administration of the drugs is medically appropriate.” 539 U.S. at 180-83 (emphases in original).

In any case where the State seeks to forcibly medicate a person in order to stand trial, “[t]he State bears the burden of proving each element justifying involuntary medication by clear, cogent, and convincing evidence.” State v. Hernandez-Ramirez, 129 Wn.App. 504, 512, 119 P.3d 880 (2005).

b. The court did not hold the State to its burden of proving the necessity of forced medications by clear, cogent, and convincing evidence. After a hearing on whether the State could forcibly medicate Hohf, the court granted the request without applying the clear, cogent, and convincing evidence standard. 11/12/08RP 143-63; CP 130-34.

The only burden of proof the court acknowledged in its combined competency-forced medication hearing was whether the State proved Hohf’s incompetence to stand trial by a “preponderance of evidence.” 11/12/08RP 153. A preponderance

of the evidence is a standard of proof in which litigants “share the risk of error in roughly equal fashion,” used when society has minimal interest in the outcome of the dispute. In re: Custody of C.C.M., 149 Wn.App. 184, 203, 202 P.3d 971 (2009). Proof by clear, cogent and convincing evidence applies to cases where there are severe consequences requiring a more rigorous standard of proof. Id. at 204-05.

Where the court applies the incorrect burden of proof, its ruling is based on a misapprehension of law and is legally erroneous. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (a court ‘would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.’” (quoting Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993))).

The court noted Hohf’s competency “is a close issue,” and the doctors’ reports “lean toward competency,” but found there was a preponderance of evidence showing Hohf was incompetent to stand trial based solely on his inability to work with his defense attorneys. 11/12/08RP 144, 153. The court did not apply a different burden of proof when deciding whether the State established Hohf met the criteria for forced involuntary medication,

and never found clear and convincing evidence favoring forced medications as necessary and substantially likely to rectify Hohf's incompetence. 11/12/08RP 154-55. Accordingly, the court did not hold the State to its required burden of proof by clear, cogent, and convincing evidence. See Hernandez-Ramirez, 129 Wn.App. at 512 (upholding order of forced medications where record supports court's conclusions "with clear, cogent, and convincing evidence").

The court's ruling showed its ambivalence about the quantum of evidence demonstrating the need for forced medications and recognized the scant scientific proof of the efficacy of medications to render Hohf competent to stand trial. 11/12/08RP 144, 153-55. The court's misapprehension of the burden of proof thus led the court to erroneously order Hohf to submit to forced administration of antipsychotic medications.

c. The State did not prove the significant and necessary basis for forcibly medicating Hohf. The State must prove by clear, cogent, and convincing evidence that involuntary medication will significantly further its interests and is necessary to further those interests. Sell, 539 U.S. at 180-83. Not only did the court fail to find the State proved the need for forced medication by clear and convincing evidence, the State did not offer any such

clear or convincing evidence of the necessity of medications or the substantial likelihood they would render Hohf competent.

Hohf had no previously diagnosed mental illness and no prior mental health hospitalizations. He had never received antipsychotic medications. Thus, the State could not point to any prior successful response to medications that would indicate the likelihood such medications would aid him.

The only evidence the State's expert Gleyzer could find about the general benefit of medications for people diagnosed with the delusional disorder he believed Hohf had was a single study from North Carolina involving 22 patients. 11/12/08RP 64. The North Carolina study reported that the majority of the 22 patients involuntarily treated "were eventually restored to competency to stand trial." 11/12/08RP 64. Gleyzer did not know whether the study's competency restoration statistics came from medications alone, or whether the study also noted how people improve without medications. *Id.* at 74.

Gleyzer could not offer a firmer opinion as to the helpfulness of medications due to the lack of other studies documenting its usefulness in treating people diagnosed with delusional disorder as well as the rarity of the disorder. 11/12/08RP 80. Gleyzer also

conceded that people in the field disagreed over whether Hohf's diagnosis was treatable in general, but said there is a consensus that treatment is beneficial. Id. at 75; but see Sell, 539 U.S. at 171 (expert who diagnosed Sell with only delusional disorder believed "medication rarely helps" this disorder).

Defense expert Muscatel thought Hohf suffered from a paranoid personality disorder, although he could not rule out delusional disorder. 11/12/08RP 89. Muscatel explained that delusional disorders are very rare and usually the delusion is confined to a narrow issue, while a paranoid personality disorder is an enduring suspicious thought process. 11/12/08RP 93-94. He did not know whether medications would help Hohf, and thought it entirely possible that Hohf would remain paranoid and hard to work with even if given antipsychotic medications. Id. at 98. Muscatel explained that a paranoid personality disorder does not usually make a person incompetent to stand trial. Id. at 101.

The trial court found the North Carolina study constituted "a showing" that medication would aid Hohf's restoration, but also noted its ambiguous application to Hohf's circumstances. 11/12/08RP 155. The court ruled that whether the North Carolina study "applies here or not," Gleyzer's testimony indicated

medication would further the State's interest in rendering Hohf competent to stand trial. Id. Since Gleyzer relied on this North Carolina study of 22 patients as the only concrete evidence that medications could benefit Hohf, the court inferentially rested its finding that medications would help Hohf's competency upon this study of which little details were known.

The State was required to present clear, cogent, and convincing evidence that forcible administration of these antipsychotic drugs was necessary and substantially likely to render Hohf competent to stand trial. The trial court, not the reviewing court on appeal, must weigh the evidence and determine that the required elements are proven by clear, cogent, and convincing evidence. Endicott v. Saul, 142 Wn.App. 889, 910, 176 P.3d 560 (2008). At most, the court found "a showing" that forced medications could improve Hohf's disposition, without ever finding this necessary threshold established to the degree of high probability required. 11/12/08RP 155.

The court's findings of fact are not supported by the evidence and were not based on proof by clear and convincing evidence. See Burkey v. Baker, 6 Wn.App. 243, 244, 492 P.2d 563 (1971) (court reviewing findings "must be cognizant that

evidence which is 'substantial' to support a preponderance test may not be sufficient to support the requirements for a test requiring clear, cogent and convincing evidence").

The court found Hohf's "condition is treatable with psychotropic medication," which presents a "substantial likelihood" that medication will make Hohf competent. CP 131 (Finding of Fact 2.6). It also entered the finding that medication is "necessary" and no other treatment is available to treat Hohf. CP 131 (Finding of Fact 2.7). But the court's findings were based on the scant evidence of this North Carolina study of 22 patients, which did not report other treatment possibilities and there was no evidence that anyone tried other treatment options for Hohf, who had never received any mental health treatment of any kind. CP 131.

Hohf was not dangerous. CP 131. He was compliant with the rules and regulations of the jail. 11/12/08RP 73. He had no history of benefitting from, or even receiving, antipsychotic medications. He "absolutely" understood the relevant legal issues, his charges, and the court system. 11/12/08RP 57, 89. The minimal evidence indicating Hohf might benefit from forcibly administered medications is simply insufficient to overcome his rights to bodily integrity, personal autonomy, and a trial

uninfluenced by the side effects of medications. Hohf's trial defense rested on whether he was justified in his use of force and required him to give cogent and persuasive testimony. CP 59; 7/9/09RP 24-29. The court's failure to apply the correct burden of proof before forcing Hohf to submit to involuntary medications denied him his right to due process of law.

2. THE STATE DID NOT PRESENT SUFFICIENT EVIDENCE THAT HOHF WAS INCOMPETENT TO STAND TRIAL WHERE HE DID NOT TRUST HIS ATTORNEYS AND WANTED TO REPRESENT HIMSELF

a. A court order of incompetence to stand trial may not rest on the accused's disinterest in assisting counsel because he wants to represent himself. A person accused of a crime must be competent in order to stand trial. Dusky v. United States, 362 U.S. 402, 403, 80 S.Ct 788, 4 L.Ed.2d 824 (1960); U.S. Const. amend. 14; Wash. Const. art. I, § 3. A person's competence is presumed and the party believing the accused to be incompetent must meet its burden of proof by a preponderance of evidence.

While it is fundamentally unfair to force an incompetent person to stand trial, a finding of incompetency also impinges on an accused person's rights, as it allows the State to delay a trial,

involuntarily commit a person, and potentially administer forced medication. See Jackson v. Indiana, 406 U.S. 715, 738, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972) (it violates due process to hold person indefinitely based on incompetence to stand trial); Addington v. Texas, 441 U.S. 418, 426, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection”); CrR 3.3(e)(1) (excluding “all proceedings relating to” competency to stand trial from speedy trial calculation). Consequently, a defendant who believes himself to be competent and wishes to proceed with trial suffers the impairment of his rights to a speedy trial, to be at liberty rather than confined while the State attempts to “restore” competence, and to decline unwanted treatment.

In Dusky, the Supreme Court defined the standard of competency to stand trial as including both: (1) whether the defendant has “a rational as well as factual understanding of the proceedings against him” and, (2) whether the defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.” 362 U.S. at 402 (internal quotation marks omitted). Dusky is a brief opinion that does not discuss all facets of competency issues, but courts rely on it for its

explanation of the standard of competency. See e.g., Drope v. Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); Godinez v. Moran, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993); Indiana v. Edwards, ___ U.S. ___, 128 S.Ct. 2379, 2386, 171 L.Ed.2d 345 (2008).

By statute, Washington defines incompetence to stand trial as occurring when “a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect.” RCW 10.77.010(14).

In Edwards, the Supreme Court ruled that under the federal constitution, the Dusky standard of competence is not the standard for when a person seeks to represent himself. Edwards, 128 S.Ct. at 2386. The court reasoned that when a person seeks to represent himself, the accused’s ability to assist counsel in preparing a defense, discussed in Dusky, is not the pertinent benchmark. Id. at 2386.

The Edwards Court held that a judge may “take realistic account of the particular defendant’s mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so.” Id. at 2387-88. Thus, the court

crafted a new rule under the Sixth and Fourteenth Amendments for a person who seeks to represent himself when that person suffers from “severe mental illness.” In that circumstance, the trial court may assess not only the individual’s ability to understand the proceedings but also whether the individual has the ability to conduct trial proceedings alone. Id. at 2388.²

b. Incompetency may not be based on a person’s desire to waive counsel. The trial court found Hohf incompetent to stand trial solely because he did not wish to cooperate with his attorneys, not because he did not understand the proceedings against him. CP 131 (“The defendant is capable of appreciating his peril and has a rational, as well as factual, understanding of the proceedings against him”). Hohf wanted to represent himself rather than assist attorneys he did not trust, and he unequivocally asked to do so. The proper question was not whether Hohf could help assigned counsel but whether he could assist in his own defense. The court’s insistence that Hohf must get along with his lawyers to be competent is contrary to the controlling statute and denied Hohf his right to represent himself in all proceedings.

² The Indiana v. Edwards standard of when a person may waive counsel arises under the federal constitution. Its application to Washington, which has a broader right of self-representation, is discussed *infra*, section 3.

Washington defines incompetence to stand trial as: either the person “lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect.” RCW 10.77.010(14) (emphasis added). The test is not whether the accused can help his or her lawyer, but rather whether he can “assist in his or her own defense,” which is a separate question from whether the accused person likes her lawyer.

More significantly, Washington law expressly authorizes a person to represent himself even in competency proceedings. RCW 10.77.020(1) entitles a person to appointed counsel during “any and all stages” of competency proceedings as well as the right to waive the assistance of counsel. The statute explicitly commands, “A person may waive his or her right to counsel; but such waiver shall only be effective if a court makes a specific finding that he or she is or was competent to so waive.” RCW 10.77.020(1).

RCW 10.77.020(1) provides criteria the court must consider when determining whether a person is competent to waive counsel. The statute mandates that in assessing an accused person’s waiver of counsel:

[T]he court shall be guided but not limited by the following standards: Whether the person attempting to waive the assistance of counsel, does so understanding:

- (a) The nature of the charges;
- (b) The statutory offense included within them;
- (c) The range of allowable punishments thereunder;
- (d) Possible defenses to the charges and circumstances in mitigation thereof; and
- (e) All other facts essential to a broad understanding of the whole matter.

These statutory criteria expressly recognizing an accused person's right to self-representation even during competency proceedings reflects and codifies Washington's broad right to self-representation. Article I, section 22 of the Washington Constitution guarantees that "in criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel," which includes "the constitutional right to represent himself." State v. Silva, 107 Wn.App. 605, 618, 27 P.3d 663 (2001) (Silva I). This right, broader than the federal constitutional right of self-representation, is "absolute," and "its deprivation cannot be harmless." State v. Vermillion, 112 Wn.App. 844, 851, 51 P.3d 188 (2002). (citing McKaskle v. Wiggins, 465 U.S. 168, 177 n.8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984)); Silva I, 107 Wn.App. at 618.

In Hohf's case, the trial court did not analyze his ability to represent himself; rather, it found that his failure to communicate

with counsel necessarily rendered him incompetent to stand trial. The court told Hohf it would not and could not consider his request for self-representation until after it resolved the question of his competency. 10/14/08RP 4, 20.

In assessing his competency, the court found Hohf understood the proceedings against him. As State's expert Gleyzer acknowledged, he has "excellent command" of relevant legal terminology and issues. 11/12/08RP 57. The court expressed no concern that Hohf did not appreciate the nature or seriousness of the charges. See RCW 10.77.020(1). Even though the court did not address the criteria for self-representation outlined in RCW 10.77.020(1), the court's assessment of Hohf's understanding of the case indicates he comprehended the critical factors of self-representation.

Because Hohf asked to represent himself, the court erred in finding him incompetent to stand trial based on his dislike or distrust of his attorneys. By failing to understand that Hohf had the right to represent himself even during the competency proceedings as well as thereafter, and ignoring the statutory criteria for measuring his waiver of counsel, the court used an invalid measure of incompetence and denied Hohf his right to self-representation.

c. Hohf's disapproval of his attorneys does not constitute a valid basis for finding him incompetent. A defendant's anger with his lawyer or lack of cooperation with counsel standing alone does not render him incompetent to stand trial. Although a defendant may be angry with and thus not fully cooperative with his counsel, and the attorney finds it "absolutely impossible to work with" the defendant, this behavior does not mean an accused person is not competent to stand trial during entirety of trial. State v. Hicks, 41 Wn.App. 303, 309, 704 P.2d 1006 (1985).

An accused person's complaints about his lawyer and the lack of effective communication are not the presumptive fault of the defendant's mental illness. When confronted with a serious breakdown in trust and communication between attorney and client, the court is required to inquire into the nature and extent of the conflict. A trial court may not permit a criminal defendant to be represented by an attorney with whom there is an irreconcilable conflict of interest. In Re Pers. Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (court must adequately inquire into extent of conflict); see also State v. McDonald, 143 Wn.2d 506, 513, 22 P.3d 791 (2001); United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2002) ("For an inquiry regarding substitution of

counsel to be sufficient, the trial court should question the attorney or defendant 'privately and in depth.'").

The court dismissed the legitimacy of Hohf's complaints about his attorney out of hand, without inquiring into what caused them or ascertaining if the rift could be rationally repaired. By refusing to even consider the possibility that Hohf's complaints about his lawyers were well-founded, or at least grounded in truth, the court improperly concluded that Hohf was not competent to stand trial solely because he did not trust and communicate with his lawyers.

The court's lone factual finding explaining its basis for deeming Hohf incompetent was that Hohf "has insufficient ability to rationally assist his legal counsel in the defense of this cause and to consult with his lawyer with a reasonable degree of understanding." CP 131 (Finding of Fact 2.2). The court entered this finding without considering Hohf's desire to represent himself, and also without considering whether Hohf's complaints about his attorneys could be legitimate. Under RCW 10.77.010(14), the court should have considered whether Hohf could assist in, or conduct, his own defense, not whether he could trust his lawyers.

In sum, the court found Hohf incompetent without affording him his statutory and constitutional right to self-representation and as a consequence of its misapplication of the standard for competency when a person does not wish to be represented by counsel.

3. THE COURT IMPROPERLY IGNORED AND DENIED HOHF'S REQUESTS TO REPRESENT HIMSELF

On several occasions, Hohf asked to represent himself. The court refused to consider these requests. The court's failure to consider Hohf's requests for self-representation, combined with its insistence that Hohf either assist his attorneys or be deemed incompetent to stand trial and remain committed as well as subject to forced medications, denied him his right to self-representation under Article I, section 22 and the Sixth Amendment.

a. A criminal defendant has the absolute right to represent himself if timely and unequivocal. The Washington Constitution expressly guarantees an accused person the right to self-representation, and the Sixth Amendment implicitly provides the right to proceed *pro se*. U.S. Const. amends. 6, 14;³ Wash. Const. art. I, § 22; Faretta v. California, 422 U.S. 806, 807, 95 S.Ct.

2525, 45 L.Ed.2d 562 (1975); State v. Hahn, 106 Wn.2d 885, 889, 726 P.2d 25 (1986); State v. Silva, 108 Wn.App. 536, 539, 31 P.3d 729 (2001) ("Silva II")⁴

A valid waiver of counsel requires the trial court to ensure the accused knowingly, voluntarily, and intentionally relinquishes this fundamental constitutional right. Johnson v. Zerbst, 304 U.S. 456, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Unlike the right to a fair trial, the right of self-representation includes the right to forgo trained legal assistance, and even embraces the "personal right to be a fool." State v. Fritz, 21 Wn.App. 354, 359, 585 P.2d 173 (1978). It is the defendant who suffers the consequences of a conviction, and,

It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. . . . his choice must be honored out of the respect for the individual which is the lifeblood of the law.

Faretta, 422 U.S. at 834 n.46 (quoting Illinois v. Allen, 397 U.S. 337, 350-51, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1978)).

³ The Fourteenth Amendment says in part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

⁴ Since this Court has already resolved the broader protections afforded by the Washington Constitution on this point, no Gunwall analysis is necessary. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986); see e.g., State v. Vickers, 148 Wn.2d 91, 109, 59 P.3d 58 (2002).

The trial court's discretion to grant a criminal defendant's request for self representation "lies at a continuum" based on the timeliness of the request. Vermillion, 112 Wn.App. at 855. The court's exercise of discretion is reviewed under a more deferential standard when the request is made during trial. Id. A request for self-representation is timely if based on a serious conflict with trial attorneys, "particularly" where the court knew of the conflict months prior but did not adequately inquire into it. United States v. Adelzo-Gonzalez, 268 F.3d 772, 780 (9th Cir. 2001).

The court's grounds for denying a request for self-representation may not be based upon a perception that *pro se* representation is not in the accused's best interests. Id. While a court may reject a request based on legitimate concern over trial delay or disruption of the proceedings, the court is not free to substitute its own judgment as to what is best for the defendant.

b. Hohf unequivocally asked to represent himself.

Hohf filed several motions and made several in-court requests to represent himself. 1/17/08RP 8; 1/24/08RP 3; 2/12/08RP 2; 10/14/08RP 10-11; see also CP 175 (Motion Showing Defendant Acting Pro Se); CP 172 (Hohf's letter to court, saying, "I have the constitutional right to represent myself; which I am doing.").

Although Judge Wynne initially allowed Hohf to proceed *pro se*, he considered that only a temporary arrangement and Judge Kurtz, who presided at trial, never considered Hohf's request. 1/17/08RP 8-9; CP 194. Judge Kurtz never conducted any colloquy about Hohf's ability to represent himself, or his knowing, intelligent, and voluntary waiver of counsel.

While Hohf said he wanted to waive counsel in the context of his dislike or mistrust of his appointed counsel, an unequivocal request for self-representation includes a defendant's refusal to cooperate with his attorney. State v. Sinclair, 46 Wn.App. 433, 437, 730 P.2d 742 (1986), rev. denied 108 Wn.2d 1006 (1987). When "the defendant insists that in the absence of substitute counsel he be permitted to defend *pro se*, his request must be deemed unequivocal." Id.; see also State v. Barker, 75 Wn.App. 236, 240, 881 P.2d 1051 (1994) (unequivocal request for self-representation where defendant asked "to represent myself" only after court refused to appoint new counsel).

The refusal to accept counsel constitutes a waiver of the right of counsel even if the defendant insists he does not wish to proceed *pro se*. United States v. Massey, 419 F.3d 1008, 1010 (9th Cir. 2005). In Massey, the defendant "declin[ed] every

constitutionally recognized form of counsel while simultaneously refusing to proceed *pro se*.” These “tactics . . . amount to an unequivocal waiver of the right to counsel.” Id.

A defendant unambiguously requests to proceed *pro se* when he asks to be “lead counsel” with “appointed counsel” only available to assist. State v. Hegge, 53 Wn.App. 345, 348-49, 766 P.2d 1127 (1989); see also United States v. McKinley, 58 F.3d 1475, 1480 (10th Cir, 1995). A court must construe a defendant’s request to be the “lead counsel” as an unequivocal request for self-representation notwithstanding the lack of a constitutional right to stand-by counsel. McKinley, 58 F.3d at 1480.

Hohf clearly expressed his desire to represent himself, and the court, defense attorneys, and prosecution understood it was his desire to represent himself. See 10/14/08RP 16 (prosecutor stating opposition to Hohf’s self-representation). Failing to afford Hohf this opportunity, or engage in the mandatory analysis under RCW 10.77.020(1) regarding Hohf’s understanding of the proceedings, denied him his constitutional right to waive counsel.

c. Under the broader state constitutional right of self-representation, a *pro se* request must be granted when timely made, so long as the accused understands the nature of the proceedings. Washington has long recognized its constitution guarantees the right of a defendant to choose to represent himself. State v. Hardung, 161 Wash. 379, 383, 297 Pac. 167 (1931); Wash. Const. art. I, § 22. This right to self-representation is rooted in respect for autonomy. State v. Deweese, 117 Wn.2d 369, 375, 816 P.2d 1 (1991).

In Silva I, this Court conducted a detailed Gunwall analysis, finding that Washington more broadly protected an accused person's right of self-representation than the federal constitution. 107 Wn.App. at 617-23. The Gunwall factors of comparing textual differences, constitutional and common law history, pre-existing state law, and particular state concern favor interpreting the Washington constitution's guarantee of the right of self-representation as more absolute than its federal counterpart. Id.

In Edwards, the Supreme Court held that under the federal constitution, a defendant must be allowed to represent himself unless he has a "severe mental illness." 128 S.Ct. at 3688. Hohf did not have a severe mental illness that interfered with his ability to

understand the proceedings. His “lack of competency” rested solely on his difficulty in getting along with his attorneys.

The court found Hohf did not present any danger to himself or others. CP 131. Hohf was respectful in court, cooperative during the proceedings, and complied with the behavioral rules and regulations of the jail. 11/12/08RP 73. He did not interrupt the judge or show disrespect to the court. Although he filed a number of pleadings in the case, he did not behave contemptuously or discourteously.

When a defendant makes a timely, unequivocal request to proceed *pro se*, the trial court must engage in a colloquy to determine whether he is waiving his right to counsel knowingly, intelligently, and voluntarily. Faretta, 422 U.S. at 835. In a competency proceeding, the court may consider whether the accused understands the nature of the proceedings. RCW 10.77.020(1). It may not ignore the request, and may not demand the accused get along with his trial attorneys or risk being found incompetent to stand trial and suffer forced administration of anti-psychotic medications. The court’s failure to consider Hohf’s request to proceed *pro se* denied him his right to represent himself,

which is a structural error not subject to harmless error analysis.

Silva II, 108 Wn.App. at 542.

F. CONCLUSION.

The court erroneously found Hohf incompetent to stand trial, which substantially delayed his trial, forced him to submit to involuntary administration of antipsychotic medications, and denied him his right to self-representation. For the reasons stated above, Mr. Hohf respectfully asks this Court to reverse his conviction and remand this case for a new trial.

DATED this 16th day of March 2010.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A



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SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,	Plaintiff,
v.	
HOHF, RUSSELL CARL,	Defendant.

No. 07-1-03291-1

FINDINGS OF FACT AND CONCLUSIONS
OF LAW AS TO COMPETENCY TO STAND
TRIAL AND FOR FORCED MEDICATION

I. HEARING

1.1 Date: November 12, 2008

1.2 Judge: David A. Kurtz

1.3 Appearances: The plaintiff appeared by Janice E. Ellis, Prosecuting Attorney for Snohomish County, by and through her deputy, Helene C. Blume. The defendant appeared in person and by counsel, Kelli Armstrong-Smith and Charles Markwell.

1.4 Purpose: (1.) To determine the competency of the defendant to stand trial and enter a plea; (2.) To determine whether Western State Hospital should be allowed to forcibly medicate the defendant, if necessary.

1.5 Evidence: The court considered the following evidence:

a. The testimony and two written reports dated April 17, 2008 and September 16, 2008, respectively, of Dr. Roman Gleyzer, a forensic psychiatrist at Western State Hospital testifying for the state;

b. The testimony and written report dated July 27, 2008 of Dr. Kenneth Muscatel, a licensed psychologist in private practice in Seattle, Washington, testifying for the defendant;

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- c. The in-court statement of the defendant, Russell Hohf;
- d. Numerous letters and motions filed by the defendant, Russell Hohf;
- e. A declaration dated October 13, 2008 previously filed by the defendant's attorney, Kelli Armstrong-Smith, on the issue of competency;

II. FINDINGS OF FACT

The court having considered the evidence and the argument of counsel makes the following Findings of Fact:

2.1 Appreciation of Peril: The defendant is capable of appreciating his peril and has a rational, as well as factual, understanding of the proceedings against him.

2.2 Assistance in Defense: The defendant has insufficient present ability to rationally assist his legal counsel in the defense of this cause and to consult with his lawyer with a reasonable degree of understanding.

2.3 The defendant suffers from a diagnosable mental illness.

2.4 The defendant does not present as a substantial danger to himself and others if his mental illness remains untreated when he is in a controlled environment, such as the Snohomish County Jail or Western State Hospital.

2.5 The State has important governmental interests at stake in this case. The crime charged is Assault in the First Degree in which it is alleged that the defendant shot the victim in the face at close range.

2.6 The defendant's condition is treatable with psychotropic medication. There is a substantial likelihood that medication will render the defendant competent. Dr. Gleyzer testified regarding a retrospective study in North Carolina in which 77% of the people studied were restored to competency through the use of psychotropic medication. Medication, whether forcible or voluntary, will significantly further the State's interests in bringing this case to trial.

2.7 Medication is necessary to further the State's interests. There is no other treatment available for the defendant's condition other than medication. While there are other therapies that may be used in conjunction with medication, they will not restore his competency without the use of medication. Therefore, there are no less intrusive means available for treating the defendant.

2.8 Psychotropic medication is medically appropriate for the defendant's mental illness and it is in his best interest to receive treatment.

Findings of Fact and Conclusion of Law as to Competency Page 2 of 5
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2.9 Western State Hospital will closely monitor the defendant for side effects from the medication and will adjust or change his medication as necessary.

III. CONCLUSIONS OF LAW

On the basis of the foregoing Findings of Fact and the record herein, the court makes the following Conclusions of Law:

3.1 Competency to Stand Trial: The defendant is incompetent to stand trial because he is incapable of assisting his attorney in his defense due to his mental illness.

3.2 Competency to Enter a Plea: The defendant is incompetent to enter a plea.

3.3 The two-prong requirements of *Washington v. Harper*, 494 U.S. 210 (1990) are not met in that the defendant is not a danger to himself and others if unmedicated so long as he is in a controlled setting, such as a jail or hospital.

3.4 The four step requirements of *Sell v. U.S.*, 539 U.S. 166 (2003) are met. See 2.5, 2.6, 2.7 and 2.8 above.

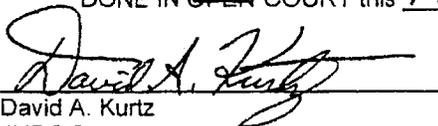
IT IS ORDERED that the defendant shall be committed to the Secretary of the Department of Social and Health Services for not longer than 90 days for treatment and evaluation in accordance with RCW 10.77.090(1), and it is further ordered that Western State Hospital is authorized to forcibly medicate the defendant, if necessary.

IT IS ORDERED THAT (1) the following medications may be forcibly administered to the defendant, if necessary: Abilify, Clozapine, Seroquel, Risperidone, Geodone, and Olanzapine. These are the medications Dr. Gleyzer testified are atypical anti-psychotic medications which he described as the first line of medications; (2) The older class of anti-psychotic medication testified to by Dr. Gleyzer may not be administered without further order of the court; (3) The dosage of the medications administered must be as low as possible within the doctor's discretion. The maximum dosage shall not exceed the F.D.A. guidelines without further order of the court; (4) If the defendant refuses his medication and has to be forcibly medicated, he shall not be forcibly medicated beyond December 5, 2008 without further order of the court. If the defendant is refusing his medication, Western State Hospital shall send a report to the judge, defense attorneys, and the deputy prosecutor describing the defendant's treatment and condition no later than December 5, 2008. This report is only necessary if the defendant is

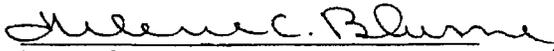
being forcibly medicated; (5) Western State Hospital shall provide a written report by January 12, 2009 describing the defendant's status; (6) A status hearing is scheduled for January 28, 2008 at 1:30 in Department 8. The defendant shall not be transported to the hearing unless he has been restored to competency and is residing in the Snohomish County Jail. (7) A hearing on the issue of competency is scheduled for February 10, 2009 at 1:00 p.m. in ~~Courtroom 304~~ ^{Department 8} if the hearing has not been scheduled previously; (8) If the treatment providers at Western State Hospital believe that the defendant needs to be (a) prescribed higher dosages of the above medication or (b) forcibly medicated beyond December ⁵~~8~~, 2009, they shall immediately notify the Court, defense attorney, and deputy prosecuting attorney so that a hearing on the issue or issues can be brought before the Court.

IT IS FURTHER ORDERED that all further proceedings herein are stayed pending defendant's return to this court.

DONE IN ~~OPEN~~ COURT this 14th day of November, 2008.


David A. Kurtz
JUDGE

Presented by:


Helene C. Blume #15462
Deputy Prosecuting Attorney

Copy received and approved as to form by:

Findings of Fact and Conclusion of Law as to Competency Page 4 of 5
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PA#07F04957

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Attorney for Defendant



Charles Markwell
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 63906-4-I
)	
)	
RUSSELL HOHF,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF MARCH, 2010, I CAUSED THE ORIGINAL **CORRECTED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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EVERETT, WA 98201 | (X)
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() | U.S. MAIL
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_____ |
| [X] | RUSSELL HOHF
958644
AIRWAY HEIGHTS CORRECTIONS CENTER
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AIRWAY HEIGHTS, WA 99001 | (X)
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DIVISION ONE

SIGNED IN SEATTLE, WASHINGTON, THIS 16TH DAY OF MARCH, 2010.

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