

64697-4

64697-4

NO. 64697-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

CHARLES DELAURO,

Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRIAN GAIN

REPLY BRIEF

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A. ARGUMENTS IN REPLY

DeLauro argues that Western State Hospital competency reports are not "court records" unless they are formally filed by the judge and unless the particular legal issue at bench is contested. Accepting his arguments would defeat the open administration of justice; they should be rejected. The constitutional admonition to openly administer justice requires that reports showing whether the defendant is competent to understand the proceedings and able to assist his lawyer be filed and available for public inspection, unless constitutional and GR 15 standards are met.

1. THE WSH COMPETENCY REPORT IS A COURT RECORD.

DeLauro first argues that a competency report is not a court record. He asserts that GR 31(c)(4) "provides no insight" into this question. Br. of Resp. at 11. He is mistaken. The statement of purpose and the legislative history of GR 31 establish that this rule was intended to ensure broad and easy access to all documents used in litigation before the court. See 2 Karl B. Tegland, Washington Practice: Rules Practice, GR 31, In General -- History of GR 31, drafter's cmts., pocket part at 64 (6th ed. 2004). The

"policy and purpose" of the rule is "to facilitate access to court records as provided by article I, section 10 of the Washington State Constitution." GR 31(a). "Access" "means the ability to view or obtain a copy of a court record." GR 31(c)(1). Moreover, the "rule applies to all court records regardless of the physical form of the court record or the method of storage of the court record." GR 31(b). The language of the rule quite plainly says that a court record "includes, but is not limited to . . . [a]ny document [or] information . . . that is maintained by a court in connection with a judicial proceeding." GR 31(c)(4).

Under this deliberately broad definition, a competency report is a court record. The report is clearly a "document" and it contains important "information" about the defendant's ability to understand the proceedings. It is submitted to the court and is "maintained by the court in connection with [a] judicial proceeding" to determine competency. GR 31(c)(4). The report came into existence only because the court *ordered* it. DeLauro does not claim that the competency report is merely an administrative record. GR 31 (b), (c)(2). Thus, competency reports are plainly court records under the plain language of GR 31. Further analysis is unnecessary.

DeLauro argues that "no statute required the filing of the report." Br. of Resp. at 12. This assertion is irrelevant and stands the presumption of openness on its head. The assertion is irrelevant because, as argued above, a court rule already mandates the filing of any document "maintained by a court in connection with a judicial proceeding." GR 31(c)(4). Whether a statute also directs the filing of the report is superfluous. The constitutional principle that justice be administered openly presumes that documents used by the court will be available for public inspection. Art. I, § 10. A statutory or rule-based limit on openness cannot trump the constitutional provision. State v. Waldon, 148 Wn. App. 952, 962, 202 P.3d 325 (2009).

DeLauro's reliance on RCW 10.77.210 is inapposite. That statute applies to all involuntary commitments under chapter 10.77 and it simply restricts dissemination of mental health records to unauthorized persons. It does not trump the more specific provisions of RCW 10.77.065, which pertain solely to mental evaluations ordered under RCW 10.77.060. That statute provides that the treatment facility "shall provide its report" to the court.

DeLauro argues that the legislature knows when to require *filing* of a report and its decision to say "provide" instead of "file" in

RCW 10.77.065 means the legislature intended that reports not be filed. Br. of Resp. at 15. This argument reads too much into the language. It makes perfect sense that the evaluator "provide" the report to the court under these circumstances instead of filing the report with the clerk because the evaluator is not a lawyer or a party to the criminal action. The statutes that DeLauro cites deal with requirements that lawyers or parties file documents. Br. of Resp. at 15-16. Moreover, because the court may wish to seal or redact portions of the report prior to filing, it makes sense that a treatment provider not file the report before the parties and the court can review it. Although a defense lawyer can *choose* to "file" a competency report that the lawyer has independently obtained, RCW 10.77.060(2), nothing compels the lawyer to file the report unless he decides to use it. Br. of Resp. at 16. And, of course, the lawyer can clearly seek sealing or redaction before filing. GR 15.

DeLauro also makes passing reference to the Health Insurance Portability and Accountability Act ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 42 U.S.C.). Br. of Resp. at 14, n.10. That federal statute and its implementing regulations (the Privacy Rule, 45 C.F.R. parts 160 and 164) are inapposite because a court is not a "covered entity" so

it is not bound by the Act. HIPAA applies only to health plans, health care clearinghouses, and health care providers that transmit health information electronically. 42 U.S.C. § 1320d-1(a). The Privacy Rule, promulgated by the Department of Health and Human Services (HHS) pursuant to HIPAA, likewise applies only to "covered entities," defined as health plans, health care clearinghouses, and health care providers that transmit health information electronically. See 45 C.F.R. §§ 160.102(a), 164.104(a). The plain language of HIPAA and the Privacy Rule demonstrate that a court is not subject to this federal law. Additionally, HHS stated in its commentary to the Privacy Rule that it did not "believe that there would be any situations in which a covered entity would also be a judicial or administrative tribunal" and that the Privacy Rule "does not regulate the behavior of law enforcement officials or the courts." Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82524, 82680 (Dec. 28, 2000).

Finally, there is a circular quality to DeLauro's reasoning that undermines his position. He essentially argues that a record is a "court record" subject to the State Constitution only if the record is filed, and that a record gets filed only if the court wants to file it. He

does not identify any standard for guiding that decision to file. In other words, in DeLauro's world, the trial court becomes the sole decision-maker over the scope and protection of article I, section 10 because the trial court decides whether a document can even be considered a "court record" that is subject to the constitution. Such an approach would likely defeat the intent of the framers.

2. COMPETENCY REPORTS MUST BE FILED REGARDLESS OF WHETHER THE ISSUE OF COMPETENCY IS SUBSEQUENTLY STIPULATED OR WITHDRAWN.

In his brief DeLauro places great emphasis on the assertion that his competency had been agreed by the time the matter came before the trial court for a hearing. He asserts that this fact means the competency report was superfluous and need not be filed. For several reasons, he is mistaken.

First, the argument places the cart before the horse. A document either is or is not a court record by its nature, not depending on whether the parties agree with its conclusion. If the document is created pursuant to court order, delivered to the court pursuant to court order, and used to decide an issue central to the litigation, then the document is a court record, regardless of

whether the parties agree that it resolves the issue. If the document is a court record, then the document must be filed in the official record.

Second, the parties in a competency matter often come to agreement only *after* reviewing the relevant report, not simply because they have changed their minds by caprice. To the extent the report serves that function, it should be made a part of the formal record instead of simply slipped into an unidentified desk drawer or filing cabinet, or destroyed.

Third, the trial court has an independent duty to apply RCW 10.77.060 and determine competency once a question is raised as to the defendant's competency. State v. Heddrick, 166 Wn.2d 898, 215 P.3d 201 (2009). A report is mandatory. State v. Wicklund, 96 Wn.2d 798, 638 P.2d 1241 (1982). The substantive issue of competency cannot be waived. Heddrick, at 905. Failure to abide by mandatory *procedures* can give rise to a due process claim on appeal even if the procedural claim is ultimately rejected because it was waived. Id. at 905-07. Thus, regardless of whether counsel agree to competency, a trial court needs to review the expert's

report and rule on the issue because competency may -- and often does -- reemerge later in the trial court proceedings or on appeal.¹

Fourth, as the plethora of ineffective assistance of counsel claims illustrate, appellate counsel frequently believe themselves more perceptive and capable than trial counsel, and feel quite free to assert that stipulations made at trial were ill-advised and prejudicial to the defendant. To the extent that a competency report can shed light on the matter, it should be filed so that the appellate court can decide whether appellate counsel or trial counsel has the better view on things.² And, it is simply no answer to say that a report exists in the desk drawer of the lawyer or the prosecutor or the trial judge, because without an official record in the court file, disputes arise over whether those "private" copies (if they still exist) are the same as the report considered by the court. Costly and time-consuming remands, perhaps with new counsel in

¹ See e.g. Heddrick, 166 Wn.2d at 900 ("Concerns about Heddrick's competency arose several times as his cases proceeded.")

² The Court in Heddrick explicitly noted that the defendant had not raised an ineffective assistance of counsel claim, although such a claim could surely have been briefed, even if the claim was ultimately meritless. Heddrick, at 908. An electronic search of caselaw databases reveals that appellate counsel frequently raise ineffective assistance claims as to competency. See also e.g. State v. Carneh, No. 64536-6-1 (pending before this court).

the trial court, result. See RAPs 9.10, 9.11. There is simply no reason to create this vacuum of information.

The Heddrick case demonstrates that a long, expensive, time-consuming appeal -- one that consumes the precious resources of two levels of appellate court -- can be spawned by a challenge to the mere *procedural* aspects of the competency process,³ even where the appellate court ultimately determines that the challenge was waived. The appeal in Heddrick was complicated, in part, by the fact that a sufficient record was not made as to the basis for the various competency rulings that were occurring in two separate criminal cases pending before the superior court.⁴ The State is simply asking that a document considered by the parties and the court as to an important matter -- the defendant's ability to understand what is going on and communicate with his lawyer -- be filed with the court to eliminate any doubt as to why the parties and the court either delayed the

³ Heddrick challenged the procedure not the substance of the trial court's competency order. Heddrick, at 905 (discussing procedural versus substantive claims).

⁴ Two competency reports were at issue in Heddrick; one was filed but sealed, the other was not filed at all. Heddrick, at 902 n.1.

case for further evaluation or allowed it to proceed to trial and conviction.

DeLauro argues that since a judge's personal notes and discovery documents are not considered court records, neither should a competency report be considered a court record. Br. of Resp. at 21-27. These analogies are inapt. A judge's personal notes are clearly not materials that would ordinarily be placed in the court record. Buehler v. Small, 115 Wn. App. 914, 64 P.3d 78 (2003). Those items are *products* of the judge's deliberative process, not documents submitted to inform or influence that deliberative process. There has never been any reason, tradition, statute, or rule that requires the judge to file his personal notes. Likewise, "mere discovery" is not a part of the judge's deliberative process, so it is not considered a court document and it need not be filed with the court. See Dreiling v. Jain, 151 Wn.2d 900, 910, 93 P.3d 861 (2004); Rufer v. Abbott Labs, 154 Wn.2d 530, 540 n.3, 114 P.3d 1182 (2005). The competency report, on the other hand, certainly influences the court's competency decision.

Throughout his brief DeLauro suggests that a defendant's privacy will be necessarily invaded if competency reports are filed with the court. The open administration of justice does result in

some diminution of a litigant's privacy interests. But, to the extent that the defendant's privacy will be *unduly* invaded, DeLauro's remedy is to petition the court to seal or redact records under GR 15. Thus, the choice between filing and open justice is not as absolute or stark as DeLauro suggests.

Finally, DeLauro suggests that the State has abandoned arguments based on GR 15. Br. of Resp. at 6, fn. 6. He is mistaken. The State continues to assert that the trial court had a duty to comply with GR 15 but, since the trial court refused to even file the competency report, the issue of sealing the report under GR 15 was never litigated and is not ripe. On remand, the court should be ordered to file the competency report and comply with constitutional standards and GR 15.

B. CONCLUSION

For the foregoing reasons, this matter should be remanded to the trial court with instructions to file the competency report in the court file.

DATED this 25th day of March, 2011.

Respectfully submitted,

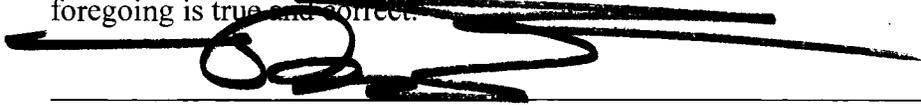
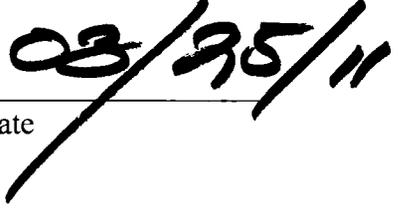
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Certificate of Service by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Eric Broman, of Nielsen, Broman and Koch, P.L.L.C., at the following address: Central Building, 1908 East Madison Street, Seattle, WA 98122, the attorney of record for the appellant, containing a copy of the Reply Brief of Appellant in STATE V. CHARLES DELAURO, Cause No. 64697-4-I in the Court of Appeals of the State of Washington, Division I.

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

A large, bold, handwritten signature in black ink, appearing to be "Eric Broman", written over a horizontal line.A handwritten date "03/25/11" in black ink, written over a horizontal line.

Name

Date

Done in Seattle, Washington