

65623-6

65623-6

NO. 65623-6-1

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

STATE OF WASHINGTON,

Respondent,

v.

GONZALO MORGAN,

Appellant.

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

The Honorable Jeffrey Ramsdell, Judge
The Honorable Sharon Armstrong, Judge

BRIEF OF APPELLANT

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of respondent/appellant/plaintiff containing a copy of the document to which this declaration is attached.

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

Eric Broman 2/29/12
Name Done in Seattle, WA Date

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in twice denying defense counsel's request for a competency evaluation. 1RP 3-15; 4RP 41-59.¹
2. The trial court's error denied appellant his statutory and due process rights.

Issues Related to Assignments of Error

1. Did defense counsel's repeated assertions of counsel's opinion that appellant lacked the ability to rationally assist in his defense establish the minimal threshold necessary to trigger a competency evaluation under RCW 10.77.060(1)(a)?
2. Did the trial court's refusal to order a competency evaluation deny appellant his due process and statutory rights to ensure that no incompetent person is tried during the period of incompetency?
3. Is the proper remedy vacation of the convictions, where the court's error prevented contemporaneous evaluation of appellant's mental status, thereby precluding any fair effort at a retrospective determination of competency?

¹ This brief refers to the transcripts as follows: 1RP – 3/26/10; 2RP – 3/31/10; 3RP 4/1/10; 4RP – 4/5/10; 5RP 4/6/10; 6RP 4/7/10; 7RP 4/8/10; 8RP 4/12/10; 9RP 4/13, 14, 15/10 and 5/28/10; 10RP 4/13/10 (afternoon, Jodi Dean reporter).

B. STATEMENT OF THE CASE

1. Procedural Facts

On May 22, 2009, the King County prosecutor charged appellant Gonzalo Morgan with one count of first degree rape of a child and two counts of first degree child molestation. CP 1-6. The trial court granted the state's midtrial motion to amend the information to charge three counts of molestation, as the state produced no evidence of penetration. 9RP 6-9.

The state theorized four potential acts might support the three counts, but did not elect an act for its theory on any count. 9RP 7-8, 103-09. The jury instead was given a Petrich² unanimity instruction and three identical "to-convict" instructions, each spanning a six-year charging period. CP 23-25. On April 15, 2010, the jury returned guilty verdicts on counts 1 and 2, but could not agree on count 3. The court accepted the two verdicts and declared a mistrial on count 3. CP 29-31; 9RP 154-64.

The court sentenced Morgan to concurrent indeterminate terms of 72 months to life. If Morgan is ever released, community custody will continue for life. CP 33-37; 9RP 172.

² CP 10; State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984); see WPIC 4.25.

2. Trial Testimony and Respective Case Theories

Trial testimony was heard over four days. The state generally presented evidence to support its theory that Y.B. – 12 years old at the time of trial – had been molested by Morgan on at least three occasions during the six-year charging period between her 5th and 11th birthdays. 9RP 101-22, 139-48.

In his videotaped statement to the investigating detective, Morgan consistently denied touching Y.B. in the way the state alleged. Ex. 18, 20. No physical evidence supported the state's case. 8RP 121-31. Before hearing the allegations none of the state's witnesses had seen anything that raised their suspicions that Y.B. might have been abused.

The defense offered substantial evidence showing why Y.B. and her family had motives to lie about her allegations. Although the prosecutor's rebuttal offered a straw-man, in an effort to criticize the defense as presenting "an argument only a lawyer could love,"³ defense counsel's closing argument was in fact persuasive and well-reasoned. 9RP 123-38. The jury hung on one of the three counts. CP 31.

3. Competency Questions

At a pretrial hearing before presiding judge Sharon Armstrong, defense counsel requested the court order a competency evaluation. Counsel informed the court that Morgan pled not guilty because it was God's will. Counsel said, inter alia:

He has told me that I am God's messenger; he has told me that I am God's mediator; he told me that I am here on behalf of God; he has told me that God has blessed me and illuminated my mind so that I can defend him.

1RP 3. Counsel informed the court these are "not the normal comments on faith that I hear," and that counsel needed more to understand whether Morgan was "intelligently evaluating this offer and this case and his possible defense or lack thereof." 1RP 3-4.

Counsel for the state provided some background, noting that Morgan had previously been represented by other counsel who shared a frustration that he was unable to appreciate the gravity of the situation or the reasonableness of the state's offer. 1RP 6.

The court suggested that no one had noted concerns in the previous 10 months, "which suggests to me that it is sort of a stress reaction." The court stated it was "sure he is competent[.]" 1RP 6.

³ 9RP 146.

Defense counsel replied, "I don't sense any stress in Mr. Morgan, I don't sense any aversion to trial." 1RP 6. Morgan did not want to delay the trial. Counsel noted the issue with prior counsel was a breakdown in communication and an inability to describe a defense to counsel. 1RP 6-7.

The court then noted his desire for trial made his refusal to accept a plea unsurprising. 1RP 7.

Counsel recognized there are normal reasons a client may decline a plea offer, criticizing the strength of the state's case, for example. "[B]ut when the client tells me that I am the messenger of God, when the client tells me "I am here to mediate for God," when the client tells me that I am being illuminated by God to be able to represent him," the concerns are different. 1RP 7.

The court briefly asked Morgan "a few questions." 1RP 8. Morgan felt prepared to go to trial, and said he understood the charges and possible sentence. Morgan said he could not plead guilty because he did not commit the crime. 1RP 10. The court stated it found no reason not to go forward. 1RP 11.

The court then invited defense counsel to ask additional questions. Morgan confirmed his belief that counsel was "God's messenger," that counsel was here "to mediate on behalf of God,"

that God had “illuminated [counsel’s] mind,” and had “blessed [counsel] so that [counsel] will be able to defend you.” 1RP 11-12.

Morgan stated God was “in the middle of us right now and he is inside each one of us.” 1RP 12. Morgan told counsel he could not lose at trial “because God is protecting [him].” 1RP 12. No matter what the witnesses or evidence might be, Morgan believed “there is no way God will allow [him] to lose.” 1RP 13. God would prevent a finding of guilt. 1RP 13.

The court denied counsel’s request for an evaluation. The court said Morgan was entitled to his belief, there was no mental illness, and there was nothing the system could do to address his situation. 1RP 14-15.

The case was then sent to trial before the Honorable Jeffrey Ramsdell. The court heard a number of pretrial motions, including a CrR 3.5 motion allowing the admission of Morgan’s videotaped custodial statement and other evidence deemed admissible under ER 404(b).⁴ 2RP 2-65; 3RP 4-132; 4RP 3-40.

⁴ The CrR 3.5 hearing was noteworthy for Morgan’s strange testimonial about-face: he initially decided to testify and did so for a short while. He then decided to not testify, forcing counsel to move to strike his testimony. 3RP 31-46.

Following the above rulings, counsel brought another motion for a competency evaluation. Counsel stated he had spoken with Morgan twice last Friday and twice today. Counsel believed Morgan was not able to intelligently understand the trial or to assist in his defense. Despite the evidence and the court's rulings, Morgan believed "there is no possible way that a jury can vote guilty because he has been told by God that that will not happen." 4RP 42. God had told him directly. 4RP 43. Counsel also relayed the information he had previously provided to Judge Armstrong. No matter what counsel tried to discuss, "I can't get over the hurdle that is has been preordained by God that it will be a not guilty." 4RP 43.

Counsel had handled numerous cases and believed this involved more than a religious belief structure. In counsel's opinion Morgan's incompetency interfered with his ability to assist counsel with a defense or to discuss the potential aspects of a defense "because he can't get over this preordainment by God that it is impossible for a jury to vote guilty." 4RP 44.

Although Judge Armstrong had reasoned Morgan's belief in his innocence and in a benevolent God was based in faith, counsel disagreed. The problem is that a person may believe in either guilt or

innocence, but a belief in a preordained verdict disrupts rational understanding and ability to assist. 4RP 45-46, 50-51.

Counsel confirmed Morgan's inability to discuss possible strategy, to understand the defense, or to evaluate potential witnesses and testimony. It became most obvious when discussing an offer with Morgan but existed in other conversations as well. 4RP 48-50.

Counsel for the state candidly admitted a lack of familiarity with potentially governing law on the question whether Morgan's belief might be the kind of mental issue justifying a competency evaluation. The state offered no opposition to Morgan's motion. 4RP 46-47.

During a colloquy, Morgan confirmed he had told counsel God would preordain a not guilty verdict. 4RP 51-52. This was despite counsel's efforts to tell him a jury would make up its own mind after witnesses testify. God would not allow a guilty verdict, no matter what happened during trial. 4RP 52-54.

The court then confirmed Morgan held those same beliefs. Morgan said he had never been disappointed in God before. 4RP 54. When the court asked Morgan a leading question – if he understood he ran the risk a jury could make a mistake and find him guilty –

Morgan said he understood. The court then said, "I think I'm stuck, counsel." 1RP 55.

Counsel said his experience with Morgan resulted in completely different answers when counsel asked the questions. When counsel asked, Morgan said "[a] jury can make a mistake, but God never makes a mistake." 4RP 57.

Counsel then made additional efforts to determine whether Morgan believed it was possible God would allow a guilty verdict. Morgan answered "If I'm innocent, how will God allow – well I just can't conceive that God would allow me to be condemned." 4RP 57-58.

The court interrupted and said "[c]ounsel, I don't know that we can get much further . . . and I don't want to lose the jurors we have." 4RP 58.⁵ Counsel again confirmed his communications with Morgan where Morgan was consistently unwilling to accept that God would allow a jury to vote guilty. 4RP 58.

The court nonetheless denied the motion for an evaluation, concluding Morgan firmly believed he was innocent. The court believed he was not unlike other defendants who believed a jury could

⁵ The court was referencing a relative dearth of available jurors, a concern it had previously voiced.

not reach a guilty verdict when a defendant is innocent. "He just stakes his faith on a higher power." 4RP 58. The court said it was in no position to question his belief system and denied the request for an evaluation. 4RP 59.

C. ARGUMENT

THE COURT ERRED BY SHORTCUTTING REQUIRED PROCEDURES AND BY FAILING TO FAIRLY DETERMINE MORGAN'S COMPETENCY OR INCOMPETENCY.

As a matter of statutory and constitutional law, a trial court must order a competency evaluation when there is reason to doubt an accused's competence. The trial court's failure to order the evaluation denied Morgan his constitutional and statutory rights. Reversal is required.

1. The Trial and Conviction of an Incompetent Person Violates Due Process.

The conviction of an accused while legally incompetent violates the due process right to a fair trial. U.S. Const. amend. 14; Const. art. 1, § 3; Drope v. Missouri, 420 U.S. 162, 172, 95 S.Ct. 896, 904, 43 L.Ed.2d 103 (1975); Pate v. Robinson, 383 U.S. 375, 378, 385, S. Ct. 836, 15 L. Ed. 2d 815 (1966). The constitutional standard for competence to stand trial is whether the accused has "sufficient present ability to consult with his lawyer with a reasonable degree of

rational understanding" and to assist in his defense with "a rational as well as factual understanding of the proceedings against him." In re Restraint of Fleming, 142 Wn.2d 853, 861-62, 16 P.3d 610 (2001) (quoting Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)). "A person is not competent at the time of trial, sentencing, or punishment if he is incapable of properly appreciating his peril and of rationally assisting in his own defense." State v. Marshall, 144 Wn.2d 266, 281, 27 P.3d 192 (2001); accord Lafferty v. Cook, 949 F.2d 1546, 1551 (10th Cir. 1991) (rational understanding is necessary to establish competence).

Under Washington statutes, an accused is incompetent if (1) he lacks an understanding of the nature of the proceeding; or (2) is incapable of assisting in his defense due to mental disease or defect. RCW 10.77.010(14); Fleming, 142 Wn.2d at 862. "[N]o incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity continues." State v. Wicklund, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982).

This Court recently discussed the interplay between the statutory procedures and minimal components of due process:

Failure to observe procedures adequate to protect this right is a denial of due process. State v. Heddrick, 166 Wash.2d 898, 904, 215 P.3d 201 (2009). Procedures

designed to protect the right are set forth in chapter 10.77 RCW. The statutory procedural requirements are mandatory, not merely directory. Heddrick, 166 Wash.2d at 904, 215 P.3d 201.

State v. DeLauro, 163 Wn.App. 290, 292, 258 P.3d 696 (2011).

2. The Threshold for Ordering a Competency Evaluation is – and Must Be – Low.

Washington's statutory competency protections have a low threshold. "Whenever" there is "reason to doubt" a defendant's competency, the court shall order an examination and report:

Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant.

RCW 10.77.060(1)(a) (quoted in DeLauro, at 292). The threshold for ordering an evaluation is lower than the threshold for determining competency. City of Seattle v. Gordon, 39 Wn. App. 437, 441-42, 693 P.2d 741 (1985). A court abuses its discretion more readily by refusing to order an evaluation than by ordering one. E.g. State v. Madsen, 168 Wn.2d 496, 510, 229 P.3d 714 (2010) (criticizing trial court's shortcut to avoid competency evaluation; where defense counsel stated concerns about Madsen's competency, the trial court "should have ordered a

competency hearing”, rather than appointing new counsel; “[a]ppointing new counsel to evaluate competency is not proper because lawyers are not mental health experts”).⁶

A trial court may consider numerous factors in determining competence, including “the ‘defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel.’” Fleming, 142 Wn.2d at 863 (quoting State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302, cert. denied sub nom. Dodd v. Rhay, 387 U.S. 948 (1967)). Courts must consider the input of defense counsel when making this determination. Drope, 420 U.S. at 177 n. 13 (“[a]lthough we do not ... suggest that courts must accept without question a lawyer's representations concerning the competence of his client ... an expressed doubt in that regard by one with the closest contact with the defendant ... is unquestionably a factor which should be considered.”); accord, Macgregor v. Gibson, 248 F.3d 946, 959-61 (10th Cir. 2001) (recognizing counsel’s opinion as “perhaps the most important” factor in determining competence, particularly where counsel has substantial experience representing the accused).

⁶ The trial judge in Madsen is the same judge who presided over Morgan’s trial.

3. When Determining Competency, a Court Must Consider and Give Considerable Weight to Defense Counsel's Opinion.

Washington courts have recognized and expanded upon Drope's wisdom. Trial courts in Washington must not only consider defense counsel's opinion, but also give that opinion "considerable weight." State v. Hicks, 41 Wn. App. 303, 308-09, 704 P.2d 1206 (1985); Gordon, 39 Wn. App. at 442; State v. Crenshaw, 27 Wn. App. 326, 331, 617 P.2d 1041 (1980), aff'd, 98 Wn. 2d 789, 659 P.2d 488 (1983); State v. Israel, 19 Wn. App. 773, 779, 577 P.2d 631 (1978). This rule is settled. State v. Harris, 122 Wn. App. 498, 94 P.3d 379 (2004) ("defense counsel's opinion as to the defendant's competence is a factor that carries considerable weight with the court") (citing State v. Swain, 93 Wn. App. 1, 10, 968 P.2d 412 (1998)). A trial court abuses its discretion when it fails to follow the controlling law, or to consider matters it must consider before rendering its decision. In re Mulholland, 161 Wn.2d 322, 332-33, 166 P.3d 677 (2007) (court's failure to apply controlling law is not merely error, but a "fundamental defect"); State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009) ("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 Wash.2d 299, 339, 858 P.2d 1054 (1993)).

The Drope rule – and Washington’s refinement of it – makes sense in the abstract, but particularly so in a case like Morgan’s where the disputed issue is whether Morgan could rationally assist his counsel. No one was in a better position to answer that than Morgan’s attorney, who had met with Morgan multiple times. As the Supreme Court recognized in Drope, counsel had the closest contact with Morgan and was in the best position to know whether Morgan was able to rationally assist counsel in preparing and presenting a defense, and in deciding whether to accept the state’s plea offer.⁷

4. The Trial Court Erred in Failing to Give Considerable Weight to Defense Counsel’s Opinion.

The case law allows a trial court fairly broad discretion in determining competency after the court orders and receives an evaluation and complies with mandated procedures. See e.g., State

⁷ An accused’s competence is as important in the plea context as at trial because the competency standard for pleading guilty is the same as the standard for standing trial. Marshall, 144 Wn.2d at 281 (citing Godinez v. Moran, 509 U.S. 389, 402, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993)); Fleming, 142 Wn.2d at 862. An incompetent person may not enter into any plea agreement because incompetency renders the plea involuntary. Marshall, 144 Wn.2d at 280-81; Fleming, 142 Wn.2d at 864. “It is axiomatic that a person incompetent to stand trial

v. Hicks, 41 Wn. App. at 307 (court did not abuse its discretion in finding Hicks competent after receiving the psychological evaluation, hearing expert testimony, and giving more weight to the psychological opinion than to an attorney's opinion, particularly where the attorney "had no psychological training and had met with Hicks for a total of 45 minutes the night before the hearing."); Heddrick, 166 Wn.2d at 903-09 (after court orders competency evaluation, trial counsel can waive full competency hearing where the evaluation provides no support for counsel's initial concerns about incompetency).

Few published cases, however, address a court's error that shortcuts those procedures without an evaluation.

One oft-cited case, Gordon, is easily distinguished. Gordon was charged with misdemeanor trespass and menacing in Seattle Municipal Court. The court stated his attorney essentially presented a "cursory opinion concerning [Gordon's] competence." Gordon, at 442. The court's questioning led the court to conclude Gordon understood the charges and their consequences. Gordon, at 442.

Unlike Gordon's counsel, Morgan's counsel consistently showed why Morgan was unable to rationally understand the

cannot affect a knowing or intelligent waiver." Heddrick, 166 Wn.2d at 906.

consequences of the plea offer or trial, or to rationally assist in the defense. The court's questioning did not undercut the established basis for counsel's consistent concern. 1RP 3-15; 4RP 42-58.

Nor does Morgan's case resemble State v. Woods, 143 Wn.2d 561, 23 P.3d 1046 (2001). On appeal, Woods' attorneys argued his penalty-phase refusal to contest the death penalty or to present mitigation evidence crossed the threshold of incompetence necessary to trigger an evaluation. The Supreme Court disagreed, noting there are legitimate reasons a person might not want to spend life in prison. Furthermore, the factual claim of incompetence was not supported by Woods' own attorneys, but instead by two so-called "death penalty experts" who had not personally interviewed Woods. Woods, at 605-06 (court's quotations). The court also reasoned that Woods' inability to recall a pretrial meeting with other mental health professionals was insufficient to establish a threshold showing of incompetency. The trial court in Woods also had the benefit of a pretrial examination, which supported the conclusion that Woods was in a "fit mental state." Woods, at 605-07. While Woods may have been despondent and upset at the guilt-phase verdict, this emotional state did not meet the threshold for ordering a competency evaluation. Woods, at 607-08.

In contrast, Morgan's counsel – the attorney who had met with him on multiple occasions – repeatedly and consistently relayed the difficulties counsel was having in counsel's attempts to rationally discuss the charges, the state's plea offer, and potential defenses. Although the court characterized Morgan's position as based on religion – something the court felt it was “not in any position to question”⁸ – the court was simply wrong. Grandiose and delusional beliefs in a protective God or other deity may support a determination of incompetence. See e.g., State v. Barzee, 177 P.3d 48, 70-71 (Utah 2007) (“Barzee's primary area of incompetency was her inability to engage in reasoned choice of legal strategies and options ... because her religious delusions, and not her best interests, drove her decision-making process”).⁹ By failing to consider what the court was required to consider, the court abused its discretion.

The court's error is further obviated by the absence of any state opposition. The state made no argument that Morgan was in any way malingering or insincere, nor that counsel had exaggerated

⁸ 4RP 59.

⁹ The Barzee decision is somewhat fractured. The clearest discussion of the reasons for Barzee's incompetence is in part III.D.2 of Chief Justice Durham's opinion, which found no likelihood that

counsel's inability to rationally communicate with Morgan. Nor was the court's desire not to lose the available jury venire a legitimate basis for shortcutting constitutionally mandated procedures.

The question is not whether defense counsel's opinion was enough to establish Morgan's incompetence. Instead, the trial court lacked the necessary evidence to fairly make that determination because it failed to follow the statutorily and constitutionally mandated procedures to produce the mental examination necessary for that decision.

In the final analysis, the trial court failed to comply with settled Washington law requiring the court to give considerable weight to counsel's opinion on Morgan's incompetence. On these facts, counsel's consistent and supported opinion met the minimal "reason to doubt" threshold in RCW 10.77.060(1)(a).

5. The Denial of Due Process Requires Vacation of the Convictions.

The proper remedy is to vacate the conviction and remand for the constitutionally necessary evaluation to assist the trial court in fairly determining Morgan's competency. The trial court's failure to adhere to adequate procedural safeguards in determining

Barzee would respond favorably to forced medication. That part of

competency violated Morgan's right to a fair trial. Pate, 383 U.S. at 377, 385-86; Israel, 19 Wn. App. at 776, 777-78. Remand on the competency issue is impractical at this point due to the passage of time, the absence of a contemporaneous competency report, and the lack of an adequate record on which to base a determination that Morgan was competent to stand trial. Pate, 383 U.S. at 387; Drope, 420 U.S. at 183.

In response, the state may request a fall-back remedy and contend this Court should instead order the trial court to make a retrospective determination of competency. Such a remedy is generally disfavored. Maxwell v. Roe, 606 F.3d 561, 576 (9th Cir. 2010). In Morgan's case, it also would be impossible. Due to the trial court's error, there are no contemporary psychological reports to permit the required fair and informed inquiry.

the opinion did not carry the majority.

D. CONCLUSION

For the reasons set forth above, Morgan's convictions should be vacated and the case remanded.

DATED this 29th day of February, 2012.

Respectfully Submitted,

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