

COA No. 67657-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES CARVER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Ronald Kessler
The Honorable Steven Gonzalez

REPLY BRIEF

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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COURT OF APPEALS
DIVISION ONE
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A. REPLY ARGUMENT

1. THE STATE DISPUTES THE DEGREE TO WHICH THE PROSECUTOR EXPRESSED CONCERN ABOUT MR. CARVER'S COMPETENCY BUT DOES NOT DISPUTE THE BASIC FACT THAT DEFENSE COUNSEL SOUGHT A NEW EVALUATION AND THE STATE SUPPORTED THIS REQUEST, INDEED INTRODUCING COUNSEL AND SPECIFICALLY URGING THE COURT TO CAREFULLY CONSIDER COUNSEL'S CONCERNS.

Respondent's first argument appears to be that the trial prosecutor did not really join in defense counsel's concerns about Mr. Carver's competency. The Respondent, in favor of citing certain statements by the trial prosecutor that were less forceful than those emphasized by the appellant in the Opening Brief, overall ignores the fact that during the seven months leading to trial, the prosecutor, later joined by new counsel, repeatedly noted that Mr. Carver had "decompensated," and urged the court to order a new evaluation.

Mr. Carver was found competent in a November, 2010 report that deemed him able to understand court proceedings, but warned that he was subject to developing delusions if he went unmedicated. He then did precisely that, as he sat in Jail for months awaiting trial.¹

¹ The report indicated "clear evidence of a mental disease or defect" which was "partially managed." Competency evaluation, at p. 7. It was noted that "even in the partially managed state, Mr. [Carver] has ongoing deficits." Competency evaluation, at p. 7. Critically, the report also noted:

The Respondent contends that the defense completed a competency evaluation during the lead-up to trial which (a) found him competent, and (b) which took into consideration the new delusions that had developed since the November, 2010 evaluation. BOR at 15. Both contentions ignore the facts. The defense evaluation of Mr. Carver's mental capacity was simply part of the in-progress defense preparation during the lead up to jury trial as a defense trial tool, and it certainly indicated concerns for competence, as represented by the lawyers.²

The Respondent also argues without basis by speculating that such interim, in-progress report, which has never been seen, considered Mr. Carver's developing delusions.

The State also notes that the defendant suffered from his twin delusions for some months, and exhibited them prior to the first refusal of a new evaluation. But the State does not dispute that these delusions manifested *subsequent to the sole evaluation, in November 2010*, nor

It is also noteworthy that it appears this man's psychotic thinking has been ameliorated in the past with the administration of psychiatric medications. He currently is not taking such medication, and he likely will not unless forced to.

Competency evaluation, at pp. 11-12.

² On June 17, 2011, defense counsel Hal Palmer noted that the defense expert's report to counsel which was still in progress had stated in "summary" form that Mr. Carver was cognitively intact; but defense counsel reiterated that he still had "grave concerns" regarding Mr. Carver's basic competence. 6/17/11RP at 45-47.

disputes that despite a highly guarded and inconclusive interim defense evaluation, counsel sought a new evaluation – which the prosecutor supported.

The Respondent offers a red herring argument by stating that Mr. Carver exhibited his delusions at various times *prior* to the Superior Court's refusal to order a second inquiry into competency (post the original ruling), and *prior* to an in-progress mental capacity report being prepared by the defense during these same months. BOR at 11-15.

But the relevant question is whether the circumstances required the trial court to order a new evaluation when the defendant, as assessed by both counsel, demonstrated decompensation during the period of months following the original November 2010 evaluation. AOB at 18-20.

It is of no consequence that these delusions may have existed at the time of one judge's earlier refusal to order a second inquiry, and thus, therefore (the State argues), that there was 'no change' in Mr. Carver at the time of the final refusal, so as to change the status quo from what it was at the time of the interim refusal.

This argument by the State fails on its false premise. Mr. Carver argued that the repeated indications of decompensation subsequent to November, 2010 required the trial court to order a second evaluation, which the court refused to do as late as July of 2011. This is the relevant

period in the “status quo ante” rule. AOB at 19. State v. Ortiz, 119 Wn.2d 294, 301, 831 P.2d 1060 (1992).

Of course, in any event, the prosecutor’s urging that the court give great consideration to defense counsel’s request for a new competency evaluation occurred subsequent to this date.

Ultimately, the Respondent ignores the fact that the prosecutor emphatically on urged the court to hear again from current defense counsel Hal Palmer, "on that [competency topic] as an officer of the court." 6/17/11RP at 55.

And ultimately, the Respondent ignores the fact that on July 11, prosecutor Vasquez indicated that Mr. Carver had now clearly “decompensated” since his November, 2010 evaluation. Noting defense counsel’s shared concern, she stated:

I wanted to alert Your Honor that the State continues to have concerns that it would be appropriate to have a new competency colloquy. The State is concerned that the defendant has decompensated in his time since December -- in his time in the jail, since 2010, that he has delusions that were not present previously when he was evaluated by Western and that that impacts his ability to understand the charges against him.

7/11/11RP at 69. Ms. Vasquez told the court that there was no expert report concerning these new delusional beliefs of Mr. Carver and urged that he had decompensated since the evaluation the previous year:

Your Honor, Mr. Carver's representations today cause the State concern that he might have decompensated in such a way that he is not able to understand the charges against him, and I would ask the Court to conduct a colloquy to see if it's appropriate to enter an order for a pretrial competency evaluation again. The State is concerned that there may have been a decompensation in mental status.

7/11/11RP at 74-75. Irregardless whether styled as a joint request for a colloquy, an inquiry, or a new evaluation, the trial court ignored the chorus of counsel urging a new competency determination. That urging was supported by the fact of the defendant's developing, or severely worsening (it matters not which) psychotic delusions, which brought to the fore the very prediction that the November, 2011 evaluator believed would arise as the defendant sat in Jail. Regardless of the State's quibbles about nuance, false contentions, and its red herring arguments misstating the relevant standard, the "status quo ante" had dramatically changed, and the trial court abused its discretion in refusing to order a new competency evaluation. U.S. Const. amends 6, 14.

**2. MISINFORMATION REGARDING THE
POTENTIAL SENTENCE VOIDS THE
FARETTA COLLOQOY.**

The Respondent concedes Mr. Carver was never at any one juncture properly told the exact punishment he faced if he represented himself and was convicted. BOR at 24-25.

But the State urges that this does not matter, because if punishment was overstated at one point, such inexactitude always qualifies as proper advisement, because it exceeds the actual punishment risked.

If the Court adopts this reasoning, trial courts can simply provide conflicting information regarding the potential punishment to defendants seeking to represent themselves, so long as at some point one of the court's numbers is some large number of years of incarceration that is imprecise and wrong but likely a lot more than the defendant actually faced.

But the cited federal constitutional provisions in the Opening Brief, and Faretta v. California, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and Article I, section 22 require an understanding of the dangers and disadvantages of self-representation. U.S. Const. amend. 14; Faretta, 422 U.S. at 835; State v. DeWeese, 117 Wn.2d 369, 376-77, 816 P.2d 1 (1991).

This means that the defendant must understand the pros and cons of representing himself – including the punishment risked. The State has a heavy burden to prove the knowing and intelligent relinquishment of a constitutional right. But it is not at all unlikely that a defendant of Mr. Carver's delusional status might react to a severely overstated potential prison sentence by panicking and deciding that he must represent himself,

in a fight for his freedom. This is not a knowing intelligent waiver made with eyes wide open to all the correct relevant risks. Faretta, supra, United States v. Forrester, 512 F.3d 500, 507 (Ninth Cir. 2008). The Ninth

Circuit stated:

The government argues that there was no Sixth Amendment violation because the district court overstated the penalties that Forrester faced. According to the government, a defendant's right to counsel is not thereby violated because he would have been more likely to waive that right had he known the actual, lower penalties he faced. The first flaw in this argument—which the government fails to support with any legal authority—is that it is not clear how a defendant's decision to waive his right to counsel may be affected by incorrect information about his potential sentence. It may be . . . that a defendant is more likely to waive his right to counsel when he is told the stakes are lower than they actually are. On the other hand, as Forrester contends, it may be that a middle-aged defendant is more prone to roll the dice with self-representation when he distrusts his lawyer and is told that, no matter what he does, he will be in jail for at least a decade if he is convicted. Had Forrester known that the stakes were lower and that he faced no mandatory minimum sentence, he may have been more likely to keep his attorney despite his misgivings about the attorney's skill and commitment to his case.

(Emphasis in original.) Forrester, 512 F.3d at 507-08. And secondly, in any event, no harmless error analysis applies to mistakes in the Faretta colloquy:

The second problem with the government's sentence overstatement argument is that it is in essence a harmless error claim. The government contends, though not in so many words, that even though Forrester was unaware of the

actual penalty he faced, there was no harm because he would have waived counsel even if he had been properly informed. But this court has repeatedly rejected harmless error analysis in the Faretta waiver context.

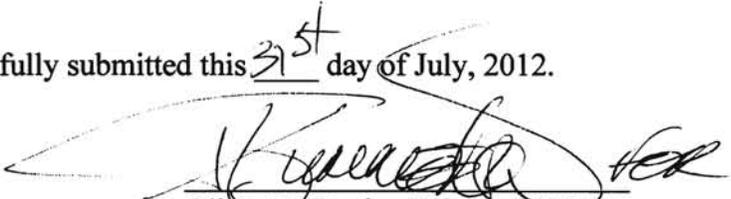
Forrester, 512 F.3d at 508.

Our Court of Appeals has noted that when a defendant is *otherwise* “aware” of the correct penalty faced, an incorrect advisement at a different time or a failure to advise may be moot. State v. Sinclair, 46 Wn. App. 433, 438-39, 730 P.2d 742 (1986). But here, it cannot be shown that Mr. Carver was ever advised correctly or knew correctly what the punishment was on the risk side of the equation. He could not make a knowledgeable waiver of his right to counsel – weighing the advantages, versus the risks of self-representation -- where he was never correctly advised of the maximum possible penalties for the crimes with which he was charged.

B. CONCLUSION

Based on the foregoing and on his Opening Brief, Mr. Carver respectfully requests that this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this 31st day of July, 2012.



Oliver R. Davis WSBA # 24560
Washington Appellate Project – 91052
Attorneys for Appellant

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DIVISION ONE**

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Respondent,)	
)	NO. 67657-1-I
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)	
JAMES CARVER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF AUGUST, 2012, I CAUSED THE ORIGINAL **REPLY 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:

[X] DONNA WISE, DPA	(X)	U.S. MAIL
KING COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
APPELLATE UNIT	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

SIGNED IN SEATTLE, WASHINGTON THIS 1ST DAY OF AUGUST, 2012.

X _____ 

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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710