

COA No. 67657-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES CARVER,

Appellant.

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

The Honorable Ronald Kessler
The Honorable Steven Gonzalez

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in declining to order a second evaluation of Mr. Carver's competence to stand trial where the prosecutor and defense counsel urged the court he had become incompetent in the seven months since the original evaluation and competency determination.

2. The trial court erred in allowing Mr. Carver to waive his right to trial counsel and proceed pro se at trial.

3. The trial court erred in entering finding of fact I regarding Mr. Carver's competency to stand trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court found the defendant competent to stand trial based on a Western State Hospital report of November, 2010 and original defense counsel's stipulation. The report deemed Mr. Carver competent based on his cognitive abilities. However, it also stated that Mr. Carver was schizophrenic, psychotic, and delusional, and warned that "this man's psychotic thinking has been ameliorated in the past with the administration of psychiatric medications [which] he currently is not taking . . . and he likely will not unless forced to." Over the ensuing 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. Among many factors, Carver believed that the harassment

complainant in counts 1, 2 and 3 (his mother) was deceased; and he believed that the stalking complainant was either an “impostor” or an actress. Did the trial court abuse its discretion in declining to order a new evaluation as required by RCW 10.77 to determine Mr. Carver’s competence to stand trial?

2. Representing himself at trial would (and did) allow Mr. Carver's delusions regarding the facts of the charges regarding complainants Laurel Zoppi and Jessica Smith, to become fully operational. In addition, before allowing waiver, the court’s pro se colloquy did not show that Mr. Carver understood the risks and disadvantages of self-representation, or that he was correctly advised of the maximum penalty upon conviction. Finally, Mr. Carver’s request to represent himself was not unequivocal, and appeared to be motivated by dissatisfaction with counsel’s intent to offer an insanity defense. Did the trial court abuse its discretion in allowing Mr. Carver to waive his right to counsel and proceed as his own lawyer?

C. STATEMENT OF THE CASE

a. Charging and facts. James Carver was charged with 5 counts relating to two victims, including felony stalking of complainant Jessica Smith, committed "on or about April 6, 2010," by an amended information

filed July 8, 2011.¹ CP 18-21. In language tracking RCW 9A.46.110, the information alleged, inter alia, that the defendant

on or about April 6, 2010, did . . . intentionally and repeatedly harass or follow Jessica Smith[.]

CP 20.² On that date, Mr. Carver spray-painted the words “Orion loves Lepus,” apparently professing his love for the complainant on her garage door, which was discovered when her husband arrived home. 7/12/11RP at 45-47. Footprints appeared to lead to the house's back porch. Police also located a chocolate Easter Bunny in the Smith's back yard.

7/12/11RP at 45-47. Mr. Carver was arrested later that day and made statements to law enforcement that indicated he was the person who spray-painted the message. 7/11/11RP at 161-68.

¹ The original information, filed July 8, 2010, named Mr. Carver's mother, Laurel Zoppi, as the complainant in one count felony harassment (threat to kill) and two counts of misdemeanor no-contact order violations. CP 1. The amended information added the new victim, Jessica Smith, the complainant in the stalking allegation, and a count of malicious mischief for spray-painting her garage. CP 20-21.

² RCW 9A.46.110 required proof that the defendant (1) repeatedly harassed, or repeatedly followed the complainant Jessica Smith, (2) intentionally or recklessly placed her in fear, and (3) that he had previously been convicted of either a crime of criminal harassment (under RCW 9A.46.060, which includes the crime of stalking) or of stalking under the stalking statute. RCW 9A.46.110(1),(2),(6); see, e.g., State v. Kintz, 169 Wn.2d 537, 542-43, 238 P.3d 470 (2010) (defendant in white van who drove past women walking down street, went out of sight, and returned multiple times during part of day, acted “repeatedly”).

The stalking crime was charged as a felony based on a prior conviction, with the amended information alleging that "the defendant had previously been convicted . . . of a crime of harassment involving Jessica Smith[.]" CP 20.³

b. Competence. On November 2, 2010, the trial court ordered an evaluation of Mr. Carver's competence to stand trial. 12/2/11RP at 13-14. Four and a half months later, on March 15, 2011, the court found Mr. Carver competent based on a defense stipulation, and the report of the Western State Hospital evaluation of Mr. Carver, filed November 24, 2010. 3/15/11RP at 16-18; Supp. CP ___, Sub # 49; CP 15 (written order of competency based on 2010 report).

Mr. Carver thereafter unsuccessfully requested new appointed counsel several times. 5/4/11RP at 23, 25 (complaining that counsel was assessing a defense of not guilty by reason of insanity). Then, on June 2 and June 17, 2011, Mr. Carver sought to proceed pro se. 6/2/11RP at 29, 6/17/11RP at 46.

During this same period, both the prosecutor and later defense counsel repeatedly raised concerns for the defendant's continued competency, noting that Mr. Carver had apparently "decompensated"

³ Mr. Carver had been convicted of stalking the same complainant in 2007 by appearing at her home. Supp. CP ___, Sub # 94 (Trial exhibit list, exhibit 16 (judgment and sentence)).

since his original evaluation. Mr. Carver apparently believed that the complainant in counts 1, 2 and 3 (his mother, who later testified) was deceased, and that the witness proffered by the State for the stalking counts was an actress, as shown by her voice in audio-recordings. 6/2/11RP at 30, 36; 6/17/11RP at 45-46.⁴

Mr. Carver was permitted to represent himself after multiple hearings and a ruling on June 17, 2011. 6/17/11RP at 57. The court refused to order any further inquiry into Mr. Carver's competence to stand trial. Mr. Carver also waived his right to a jury trial. 7/11/11RP at 119, 142-43.

c. Trial. In closing argument, the prosecutor put the stalking charge to the trial court as alleging that Mr. Carver "harassed" Ms. Smith, as opposed to following her. Relying on the April 6, 2010 incident, and on either the 2007 incident that led to conviction or on email messages that Ms. Smith received from the defendant in 2004-2005, and again in 2006, the State argued that Mr. Carver had acted "repeatedly." 7/13/11RP at 134-37; see 7/12/11RP at 35-38 (testimony of Jessica Smith).

The court found that Mr. Carver, on April 6, 2010, spray-painted the words and symbol "Orion Lepus," with a heart symbol in between the

⁴ As noted infra, during trial Mr. Carver defended his case in full reliance on these contentions.

words, on the door of the Smith's garage. CP 38 (CrR 6.1 bench trial findings, finding II). The trial court found that the defendant left a Chocolate Bunny on the property, and Ms. Smith "was fearful of future physical harm to her or her family from the Defendant, as well as future property damage." CP 39.

The court also found that five years previously, Mr. Carver had been convicted of misdemeanor stalking involving Ms. Smith. CP 39. On September 25, 2007, Ms. Smith called the Issaquah police and her husband when she arrived home and found the defendant on her front porch. Mr. Smith asked the defendant to leave. The police recovered "Swedish Fish" candy from the front porch. CP 39. In addition, in 2004 to 2006, Mr. Williams sent Ms. Smith unwanted emails. CP 38-39.

The court also found that Ms. Smith "only saw the Defendant one time after high school before 2004, when the Defendant re-contacted her via email. The emails referred to a relationship they never had." CP 39.

In its Conclusions of Law, the trial court held:

On April 6, 2010, [James Carver] intentionally harassed Jessica Smith[.] He placed her in reasonable fear of harm to herself, others, or her property. He reasonably should have known she would be placed in fear. He did so after a previous conviction for stalking Jessica Smith.

CP 40 (Conclusion of Law C). Addressing the question of what evidence is necessary to meet the "repeatedly" requirement of the statute, the court

stated that Mr. Carver's action in the present incident "qualified as repeated" because of the 2007 conviction, or because of the email messages that Mr. Carver sent to the complainant in 2004, 2005, and 2006. CP 40 (Conclusion of Law C); see 7/13/11RP at 148. The trial court also found Mr. Carver guilty of the three counts involving his mother, trial witness Laurel Zoppi, and the malicious mischief count. CP 38-40.

Mr. Carver was given suspended sentences and a first-time offender waiver. 8/5/11RP at 9; CP 23-30. He appeals. CP 42.

D. ARGUMENT

1. MR. CARVER'S MENTAL CONDITION SO DETERIORATED DURING THE 7 MONTHS HE SAT IN JAIL SINCE THE ORIGINAL REPORT THAT THERE WAS "REASON TO DOUBT" HIS CONTINUED COMPETENCY, AND THE TRIAL COURT ABUSED ITS DISCRETION IN DECLINING TO ORDER A NEW EVALUATION.

a. Competency for trial, initial determination. Due process did not allow Mr. Carver to be tried, to waive jury, to represent himself, or to be sentenced following the bench trial, if he was incompetent to stand trial. See Godinez v. Moran, 509 U.S. 389, 396, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) (equating competency standards for trial and waiver of trial rights); U.S. Const., amend. 14. By statute in the State of Washington, "[n]o incompetent person shall be tried, convicted, or

sentenced for the commission of an offense so long as such incapacity continues.” RCW 10.77.050; State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992) (statute violated if a defendant is incompetent during trial) (citing RCW 10.77.010(14)).

A person is therefore not competent to stand trial, by statute, if the person either “lacks the capacity to understand the nature of the proceedings against him . . . or to assist in his or her own defense as a result of mental disease or defect.” (Emphasis added.) RCW 10.77.010(14). The Washington Supreme Court has stated succinctly that these twin criteria for competency require that the defendant must be capable of both “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).

In this case the 2010 evaluation deemed Mr. Carver to be competent to stand trial despite suffering from mental defect, but with significant caveats, including the need for medication. Mr. Carver was initially found competent on March 15, 2011, when an attorney appearing in lieu of Mr. Carver's trial counsel stated she stipulated to competency, and the court found him competent to stand trial, indicating the ruling was based on the WSH report. 3/15/11RP at 16-18. The report had been filed November 24, 2010. Supp. CP ____, Sub # 49 (Competency evaluation).

The WSH report indicated that Mr. Carver understood he was facing “harassment” and “stalking” charges. Competency evaluation, at p. 9. Notably, Mr. Carver’s psychotic delusions did not appear at that time to be causing him to believe that Laurel Zoppi was deceased or that Jessica Smith was an “impostor.” Rather, the report indicated a then-existing understanding that his mother was alive and that the stalking complainant was the person whose home he went to, and states that Mr. Carver “complained that his action that led to the charges had been blown out of proportion.” Competency evaluation, at pp. 9-10.

Mr. Carver had been previously diagnosed with schizophrenia. Competency evaluation, at pp. 4, 7. The report indicated “clear evidence of a mental disease or defect” which was “partially managed.” Competency evaluation, at p. 7. It was noted, however, that “even in the partially managed state, Mr. [Carver] has ongoing deficits.” Competency evaluation, at p. 7. The present report specifically diagnosed Mr. Carver with the Axis 1 mental defect of psychotic disorder NOS. Competency evaluation, at p. 9.

In 2008, during a competency restoration period at Western State, a psychologist and a psychiatrist concluded Mr. Carver had “sever somatic and erotomanic delusions.” Competency evaluation, at p. 5-6. The report indicated a prior evaluation had found Mr. Carver competent because he

had a “grossly intact intellectual and cognitive function” and did not “hold bizarre beliefs about the justice system.” Competency evaluation, at p. 7. A forensic evaluation in 2010 reported that Mr. Carver’s mental condition had deteriorated since returning from military service in Iraq, with reports of psychotic symptoms. Competency evaluation, at p. 5.

The present WSH report stated that Mr. Carver understood how a criminal trial proceeds, and concluded that he was competent to stand trial. Competency evaluation, at p. 11. However, the report also noted as follows regarding the importance of management of Mr. Carver’s mental conditions:

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.

At the March 15 competency hearing, defense counsel provided no summary of the report’s findings or advocacy to the contrary and the trial court did not review any substance of the WSH report on the record. 3/15/11RP at 18.

Over the period of the subsequent 7 months, during a period of decompensation, Mr. Carver’s delusions increased to the point where ultimately counsel requested a new evaluation. However, the trial court

denied a new inquiry several times. Absent a proper second evaluation of competency for trial, Mr. Carver was not competent.

b. The trial court abused its discretion in failing to order a second inquiry into Mr. Carver's competency to stand trial.

(i) The prosecutor and defense counsel each repeatedly urged the court to order a new evaluation of Mr. Carver's competency for trial.

After Mr. Carver's evaluation in November of 2010, and over the months Mr. Carver subsequently spent in jail, his mental status apparently decompensated, to the extent that both the prosecutor and defense counsel, initially concerned over Mr. Carver's interest in representing himself, quickly returned to the topic of concerns for his basic competency to stand trial.

On June 2, 2011, defense counsel interjected during the court's pro se colloquy with Mr. Carver, noting competency concerns in the record. 6/2/11RP at 35-36. More pointedly, the prosecutor specifically asked the court for a *new competency evaluation*, remarking on the age of the 2010 evaluation by Western State and stating she had increasing concerns regarding Carver's competency to stand trial. 6/2/11RP at 36-37.

The court stated that Mr. Carver, first, was "certainly" competent to stand trial, but did ask that the defense expert further opine on Mr. Carver's competency (the court was apparently referring to his ability to

represent himself), and ended the pro se colloquy. 6/2/11RP at 36-39.

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. Mr. Palmer first noted that his client now believed that his mother Laurel Zoppi, the complainant in three of the counts, had been deceased; and argued that this belief that "a major witness in this case" was dead would seriously affect Mr. Carver's ability to defend or assist in defending the charges. 6/17/11RP at 45-47.

The prosecutor stated that her understanding was that the defense expert's in-progress report was still considering the possibility that Mr. Carver suffered not only from paranoid schizophrenia, but also a possible psychosis NOS and delusional disorder. 6/17/11RP at 46-47.

The court again responded that Mr. Carver's competency to stand trial had already been decided. 6/17/11RP at 47-48.

Regarding Mr. Carver's desire to represent himself, the court opined that it did understand how any apparent delusion that his mother was dead interfered with his ability to represent himself, remarking that Mr. Carver would have this belief "whether he represents himself or you

represent him.” 6/17/11RP at 47.

The court then continued its pro se colloquy with Mr. Carver, stating that running the felonies and other counts consecutively could result in 17 years punishment. 6/17/11RP at 51. The court inquired whether Mr. Carver had experience representing himself in court before, which he stated he had successfully. 6/17/11RP at 50-52. The prosecutor noted, however, that in one of these prior cases, the charge was dismissed because of competency issues. 6/17/11RP at 48-49.

At this point the prosecutor interrupted the court’s pro se colloquy again, to note that she had been reviewing the November, 2010 psychological report from WSH, and, although again noting the staleness of the evaluation, the prosecutor emphasized it did indicate Mr. Carver was diagnosed with an Axis 1 defect of psychotic disorder NOS. 6/17/11RP at 53-54.

Prosecutor Vasquez noted that she had discussed Mr. Carver’s mental condition with his various past attorneys, one of whom demurred a second report (and who had previously stipulated to competency to stand trial without a hearing). 6/17/11RP at 55.

However, the prosecutor emphatically 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.

The court did not wish to hear from counsel, noting it had been hearing from the attorneys including Mr. Carver's defense attorneys at every hearing on the competency issue. 6/17/11RP at 55. However, defense counsel Palmer stated, that "just for the record, that's what I believe.”:

I believe the defendant believes the alleged victim [Jessica Smith] in this case is an actress. He believes [that] her audio recording was made in 2004 and he believes his mother, who is a witness in this case, is dead.

6/17/11RP at 55-56. Counsel made clear to the court that he believed Mr. Carver was “incompetent both to stand . . . trial and to represent himself.” 6/17/11RP at 56.

However, the court stated “[t]here is no difference under these circumstances between someone with a delusion disorder which addresses the, largely, the offense itself . . . and a defendant who makes up a story”). 6/17/11RP at 56. The court ruled:

I think that the defendant is competent to stand trial and he has the min -- well, he's not -- he's definitely not competent to represent himself in terms of the ability to represent himself, but then most people who aren't lawyers don't have that competence either. But that's not the standard. I'm going to find a knowing voluntary, intelligent, waiver of the right to counsel.

6/17/11RP at 57. The court appointed Mr. Palmer as stand-by counsel. 6/17/11RP at 57.

On July 11, Judge Gonzalez, the court for the bench trial, declined to order a new competency evaluation. Prosecutor Vasquez, apologizing for raising the matter again, 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.

Judge Gonzalez indicated that he would not act unless something had changed since Judge Kessler’s inquiry into the issue in June.

7/11/11RP at 69. In response, the prosecutor stated that she had previously been unaware of Mr. Carver’s belief that the alleged victim/trial witness in counts 4 and 5 was an “impostor.” 7/11/11RP at 69. Ms. Vasquez also emphasized her perception that Mr. Carver’s condition had simply “decompensated” or worsened to the point of requiring a new competency evaluation at this time. 7/11/11RP at 74-75.

Prosecutor Vasquez told the court that there was no expert report concerning these new delusional beliefs of Mr. Carver:

Your Honor, looking at the Western State report from November of 2010, the doctor in that report notes, “The defendant appears to present with some delusional beliefs so guarded in his presentation that it was difficult to assess those. He was not showing signs of disorganization that interfered with his ability to discuss legal proceedings against him. He was able to discuss his case and his options in a meaningful way despite any delusional beliefs he might be suffering at the time of our contact.”

The doctor at Western State interviewed him with regards to the threats involving his mother, but not with regards -- from what I can tell, not in detail with regards to the stalking involving Jessica Smith. 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.

Judge Gonzalez also asked counsel if something had changed since Judge Kessler’s June inquiry, asking whether “Mr. Carver’s affect [had] been substantially stable? 7/11/11RP at 75. Counsel stated his affect had been stable. 7/11/11RP at 75.

It was unclear whether the court understood that the attorneys were urging a new evaluation of Mr. Carver’s competence to stand trial. Before beginning a pro se colloquy with Mr. Carver, the trial court also asked counsel if he had specific issues he wished the court to inquire of Mr. Carver about, then asked the defendant whether he understood the

maximum sentence, and how he would have to conduct his case.

7/11/11RP at 76. The defendant in answering these questions again indicated his mother [the three-count complainant] was dead, and that Ms. Jessica Smith, who was his girlfriend from high school, was an impostor because he heard her voice on an evidence recording and it was not her. 7/11/11RP at 76-78.

At the end of this colloquy the court told Mr. Carver he could “continue to represent [him]self.” 7/11/11RP at 80-81.

(ii) These were indications of lack of continued competency and the existence of “reasons to doubt” competency required the trial court to order a new evaluation.

Competency may always be placed into issue. “The determination of whether a competency examination should be ordered rests generally within the discretion of the trial court.” In re Pers. Restraint of Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001); see also State v. Heddrick, 166 Wn.2d 898, 903, 215 P.3d 201 (2009) (decision regarding subsequent competency hearing). The court’s finding of competency is also subject to the same deferential review standard. State v. Hicks, 41 Wn. App. 303, 309, 704 P.2d 1206 (1985). The trial court “may make its determination of the defendant’s competency from many indicators,” such as past determinations, and including:

the defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports, and the statements of counsel.

State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302 (1967). A defendant, particularly one with an existing record of competency issues in prior proceedings, may become incompetent subsequent to a professional evaluation and competence ruling later in the criminal case. “Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a chance that would render the accused unable to meet the standards of competence to stand trial.” Drope v. Missouri, 420 U.S. 162, 181, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

The language of the Washington incompetency prohibition itself, RCW 10.77.050, makes clear that a ruling of competency is a determination of its existence at that time; and thus the question of competency during subsequent proceedings is always capable of being placed into issue, upon proper showing. For example, a defendant who was competent to be tried may subsequently be determined incompetent to be sentenced. See, e.g., State v. Wright, 19 Wn. App. 381, 390-91, 575 P.2d 740 (1978). Thus, the statutory rule is that

[w]henver ... there is reason to doubt [a defendant's] competency, the court on its own motion or on the motion of any party shall [order an evaluation.]

(Emphasis added.) RCW 10.77.060(1)(a).

Specifically regarding new or subsequent competency evaluations, this statutory standard is also consistent with the Supreme Court's statement that, once the defendant has been ruled competent, the trial court need not revisit the issue *unless* "new information presented has altered the status quo ante." State v. Ortiz, 119 Wn.2d 294, 301, 831 P.2d 1060 (1992) (upholding refusal to engage in new competency assessment following evaluation in State v. Ortiz, 104 Wn.2d 479, infra, where defendant failed to produce "evidence that his condition [had] changed since his previous competency hearings").

In discussing the trial court's obligation to hold a new competency hearing, the Court in State v. Sanders, 209 W. Va. 367, 549 S.E.2d 40 (2001), similarly reasoned:

[W]hen a competency hearing has already been held and defendant has been found competent to stand trial . . . a trial court need not suspend proceedings to conduct a second competency hearing unless it is presented with a substantial change of circumstances or with new evidence casting a serious doubt on the validity of that finding.

(Emphasis added.) Sanders, 549 S.E.2d at 51 (quoting People v. Kelly, 1 Cal.4th 495, 3 Cal.Rptr.2d 677, 822 P.2d 385, 412 (1992); and United States v. Voice, 627 F.2d 138, 141 (8th Cir.1980) (refusal to conduct a second competency hearing would be reversed if court abused its

discretion in light of new evidence)).⁵

However, the RCW 10.77 standard enables the trial court to meet its obligation to ensure persons who are incompetent do not stand trial in its courtroom, regardless of when the doubts arise. Concerns for competence that reach this level of “reason to doubt” will require the court to follow the specific procedures of the statute to determine competency. State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991) (citing RCW 10.77.060); Fleming, 142 Wn.2d at 863 (procedures in RCW 10.77.060 are mandatory and failure to observe them is violation of due process).

In the present case, given the circumstances, including the urgings of both attorneys, the age of the previous evaluation, and the defendant’s conduct and statements during the almost ¾ of a year that passed since his November, 2010 evaluation, the trial court abused its discretion in not ordering another competency evaluation.

The facts in Sanders bear similarities to the present appeal. There, despite an expert's warning about the possibility of “degeneration” of the defendant’s competence if a long delay occurred, five months passed between the competency hearing and trial. Sanders, 549 S.E.2d at 50.

⁵ The federal courts have stated similarly that a new inquiry should be conducted where there is a proffer of “facts such that a reasonable trial judge should have experienced doubt about the accused's continued competency to stand trial.” Reynolds v. Norris, 86 F.3d 796, 801 (8th Cir.1996); see also United States v. Crews, 781 F.2d 826, 833 (10th Cir.1986).

Then, a month before trial, an expert raised doubt about the defendant's competency. The appellate court held that given the new indices of incompetency, and the defendant's behavior leading up to trial, the court erred by failing to re-evaluate Mr. Sanders' competency at the time of trial.

Here, after the 2010 report, multiple new indicators arose that strongly indicated "decompensation" in Mr. Carver's management of his conditions, such that he could not "rationally" assist in any defense of his case, if he could previously. See State v. Marshall, 144 Wn.2d at 281.

Mr. Carver's condition had plainly decompensated to a state below the floor of competency, despite the minimal nature of the showing required regarding the ability to assist in one's defense. For comparison, in the case of State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985), the defendant had an IQ in the 49 to 59 range, and lacked the ability to consult with his counsel on trial "strategy." The Supreme Court upheld the ruling that Ortiz did not need to be able to help with trial "strategy" to be competent. The Court affirmed competence because the defendant did have the basic capacity to recall and relate past facts. Ortiz, 104 Wn.2d at 482-83. The Court emphasized that the defendant could "relate past events which would be useful in assisting his attorney in the defense." Ortiz, 104 Wn.2d at 483.

Here, Mr. Carver had no ability to usefully assist in any logical defense, where instead of having this capacity to recall actual past facts, and to relate those facts to an attorney preparing his defense, he was now deluded about the past facts. Ortiz, 104 Wn.2d at 482-83. Mr. Carver's delusions necessarily made him believe in past facts that were not real. His belief that his mother, the complaining witness in three of the counts against him, was deceased, raised reason to doubt that he was competent to stand trial. Similarly, he was not competent to stand trial on counts 4 and 5, considering that he appeared in court pre-trial, believing the complainant was an impostor, who tape-recorded fake messages, and was posing as his high-school friend Jessica. The details of this belief of Mr. Carver's would fluctuate on different court dates, and it appeared even more strongly the case that no cogent defense could even be imagined by him, much less articulated to his counsel in even rudimentary fashion. Indeed, if Mr. Carver thought one primary victim was deceased and the other was an impostor, he not only could not assist in his defense in even the most basic way, he could not even understand the factual basis supporting the charges against him, in any manner other than nonsensical.

During the winter and spring of 2011, Mr. Carver increasingly conducted his interaction with the court in ways that evidenced a florid belief in the truth of his delusions, and on a practical level, during the

months after he waived counsel but his competence was being questioned, he devoted the bulk of his efforts as pro se defendant to pursuing subpoenas for physical evidence that he stated would support his claims. Counsel believed that this gravely concerning pattern demonstrated the harmful effects on competence accompanying Mr. Carver's Axis 1 psychosis disorder, which had previously been deemed to not then affect his competence, by the 2010 WSH report. See Ortiz, 119 Wn.2d at 301 (new competency assessment would be justified if there was "evidence that his condition [had] changed since his previous competency hearings").

The passage of significant time since that first competency determination in November, 2010, weighed greatly in favor of a new evaluation. This State has recognized that mental illness is a fluid situation with the condition of the afflicted changing repeatedly over time. State v. Lawrence, --- P.3d ----, 2012 WL 313943 (Wash.App. Div. 3, 2012, at p. 10) (no special mental competency aspect of pro se waiver) (citing Indiana v. Edwards, 554 U.S. 164, 174, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008)). Here, the lawyers specifically reported that there had been "decompensation" in Mr. Carver's mental competence over time, as trial was awaited. Cases recognize the specific risk of this sort of negative progression in persons of borderline mental competence, during

delays in the start of trial. See Sanders, 549 S.E.2d at 52 (new evaluation required where "trial did not commence until five months after [defendant] was last examined by Dr. Glance"); State v. Lafferty, 20 P.3d 342, 360 (Utah 2001) ("length of time elapsed from the prior psychiatric examination" weighed in favor of needing new, current evaluation).

Additionally, the trial court should have given greater weight to the shared assessment of the prosecutor and the defendant's counsel regarding the accused's competency, particularly after an initial report that stated Mr. Carver's mental condition was tenuous, and which provided counsel with a basis of reference for assessing that status and its affect on his functioning.

As for defense counsel, his or her opinion on competency is entitled to consideration in part because of the attorney's close relationship with the defendant, and understanding of his capability to assist counsel. State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991). This rule is followed in Washington. See, e.g., State v. Harris, 122 Wn. App. 498, 94 P.3d 379 (2004) ("defense counsel's opinion carries considerable weight with the court").

As for the prosecutor, her assessment of the defendant may be entitled to even more reliance. Certainly the trial prosecutor may also have significant contact with the defendant, in court hearings, outside of

the courtroom, and through other prosecuted cases. Here, the prosecutor was familiar with the defendant's prior cases and resolutions, including based on incompetency. See generally Drobe v. Missouri, 420 U.S. 162, 177 n. 13, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) (lawyer may have opinion based on experience with competence of defendant which is "unquestionably a factor which should be considered") (quoting Pate v. Robinson, 383 U.S. 375, 391, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966)).

In addition to being under the professional responsibility to pursue only those cases meeting prosecutorial standards, the prosecutor can assess the viability of various defenses raised by her opposing party. Here, trial prosecutor Vasquez believed trial of Mr. Carver was inappropriate absent confirmation of competency, and emphatically advocated for a re-evaluation, motivated by due process concerns, ethical guidelines, prosecutorial standards, and concerns for the tenability on appeal of any guilty verdict obtained.

However, the trial court did not appear to give genuine consideration to the competence concerns that were strongly expressed by both counsel, who together "presented [the court] with a substantial change of circumstances" casting a serious doubt on the continued validity

of the prior competence finding, which constituted a change in the “status quo ante.”⁶ Sanders, 549 S.E.2d at 50; Ortiz, 119 Wn.2d at 301.

Finally, as trial approached in spring and then the summer of 2011, Mr. Carver made statements showing an increasing influence of psychotic or deluded thinking. Mr. Carver had an outburst at one point, apparently protesting counsel’s statement that he believed the victim Jessica Smith was an actress, by saying, “I heard her voice.” 6/17/11RP at 56. In the middle of one of the court’s pro se colloquies, after the case had been pending and these counts discussed for months, Mr. Carver suddenly asked why he was charged with stalking of the person Jessica Smith.⁷ 6/17/11RP at 50.

The record indicates that Mr. Carver’s delusions about the basic facts of his conduct and the charges against him became more hardened as trial approached. This progression was virtually predicted by the November, 2010 competency evaluation. Under all the circumstances, the trial court abused its discretion in declining to order a new evaluation of Mr. Carver’s competency prior to his July, 2011 trial.

⁶ Although earlier counsel had not litigated the matter, then later raised concerns seemingly only in the area of self-representation, the court may not have immediately recognized that new defense counsel Palmer was strongly advocating a different position on the matter than prior attorneys. 6/17/11RP at 55.

⁷ The court stated that Mr. Carver would find out at trial. 6/17/11RP at 50-51.

(iii) Reversal is required.

The courts' obligation to prevent the trial of incompetents in their courtrooms requires scrutiny of all indicators of competence. In State v. Marshall, the Supreme Court vacated the defendant's guilty plea because he presented "substantial evidence calling [his] competency" at the time entered his plea "into question", and considered evidence of the defendant's conduct and competence at the hearing, presented during the later motion to withdraw the plea. State v. Marshall, 144 Wn.2d 266, 279-81, 27 P.3d 192 (2001).

Notably, at trial here, Mr. Carver continued to pursue evidence and make the argument that he was not guilty because his mother was dead, and that Ms. Smith was an actress or impostor. On July 11, Mr. Carver sought a subpoena from the court for a copy of the Redmond High School yearbook of 1998, arguing that it would show the present complainant Jessica Smith was not the person with whom he went to school and was an "impostor." 7/11/11RP at 64-67. In the middle of trial, he asked the court to let him go out and locate the real Jessica, stating "my contention that the witness today was an imposter and I'd like to locate a person I have a relationship with, Jessica Budke." 7/12/11RP at 77. In addition, Mr. Carver's effort to obtain a death certificate for Ms. Zoppi was unsuccessful, following a search of records, and Ms. Zoppi indeed later

testified at trial on counts 1, 2 and 3. 7/11/11RP at 64-67.

Mr. Carver's incompetence and the risk of error in the court's ruling denying a second evaluation is shown by the defendant's subsequent conduct at trial. But due process did not allow Mr. Carver to be tried if he was incompetent. U.S. Const. amend 14. Reversal is required where, as here, a trial court improperly denies a competency evaluation and a defendant was deemed competent to stand trial in the presence of reasons to doubt competency. See Fleming, 142 Wn.2d at 863-64; State v. Anene, 149 Wn. App. 944, 956, 205 P.3d 992 (2009).

2. MR. CARVER WAS NOT PROPERLY PERMITTED TO WAIVE THE ASSISTANCE OF COUNSEL FOR TRIAL.

a. The trial court improperly allowed Mr. Carver to waive his right to the assistance of counsel. First, if Mr. Carver was not competent to stand trial, he could not waive his right to a lawyer. See State v. Smith, 88 Wn.2d 639, 642, 564 P.2d 1154 (1977) (stating that it is axiomatic that a person incompetent to stand trial cannot affect a knowing or intelligent waiver of a constitutional right), overruled on other grounds by State v. Jones, 99 Wn.2d 735, 744, 664 P.2d 1216 (1983).

Even if the defendant was competent under RCW 10.77 and the court was not required to order a new evaluation, Mr. Carver's mental defects required the trial court deny his motion to proceed pro se. There is

no per se requirement that a court expressly consider a defendant's mental defect prior to permitting him to represent himself at trial. State v. Lawrence, 2012 WL 313943 (Wash.App. Div. 3, Feb. 2, 2012, Slip Op. at p. 7) (citing In re Personal Restraint of Rhome, 172 Wn.2d 654, 260 P.3d 874 (2011)). In addition, per State v. Hahn, 106 Wn.2d 885, 890 n. 2, 726 P.2d 25 (1986), mental defect is not a categorical reason to require that a trial court deny self-representation.

The trial court is certainly entitled to consider "known mental health problems when addressing a waiver of counsel." Lawrence, (Slip Op. at p. 7). The court below did obliquely consider Mr. Carver's mental health when determining he had waived his right to counsel.

However, that ruling, in the face of Mr. Carver's delusions and the expressed concerns of counsel, was an abuse of discretion. Mr. Carver's mental defects manifested themselves in the form of delusions about the basic nature of the factual allegations against him, and in the form of nonsensical beliefs about a rational defense. Representing himself allowed Mr. Carver's delusions regarding complainants Zoppi and Smith to become fully operational. At trial, those delusions did, and predictably did, cause him to devote the entirety of his efforts to proffering a defense that was premised on psychotic delusions, unimpeded by the guidance of a qualified defense lawyer. If Mr. Carver did meet the standard of

competence to stand trial such that no further evaluation was required, which appellant disputes, he nonetheless should not have been permitted to represent himself.

b. The court failed to obtain a knowing, voluntary or intelligent waiver. The Sixth and Fourteenth Amendments to the United States Constitution, as well as art. I, § 22 of the Washington Constitution, allow criminal defendants to waive their constitutional right to the assistance of counsel. Faretta v. California, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Article I, section 22 creates an explicit right to self-representation by guaranteeing the right to appear in person. State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010).

A defendant thus may engage in self-representation, but the waiver must be valid. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Specifically, the trial court must first establish that in choosing to proceed pro se a defendant has made a knowing, voluntary and intelligent waiver of the right to counsel:

[A] judge must investigate as long and as thoroughly as the circumstances . . . demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility.

Bellevue v. Acrey, 103 Wn.2d 203, 210, 691 P.2d 957 (1984); Johnson v. Zerbst, 304 U.S. at 464.

A thorough colloquy on the record is the preferred method of ensuring an intelligent waiver of the right to counsel. City of Bellevue v. Acrey, 103 Wn.2d at 211. Here, the trial court's pro se colloquy failed to obtain a valid waiver of counsel.

First, Mr. Carver did not have the required understanding of the dangers and disadvantages of self-representation. Faretta, 422 U.S. at 835; State v. DeWeese, 117 Wn.2d 369, 376-77, 816 P.2d 1 (1991).

He did not appear to adequately understand that as a pro se defendant he would have no per se right to the help of stand-by counsel. 6/2/11RP at 30. His request to represent himself was coupled with a request for “an assisting counsel,” indicating he believed these rights or privileges came as a package. 6/2/11RP at 30; see State v. Bebb, 108 Wn.2d 515, 524, 740 P.2d 829 (1987) (no right to standby counsel).

Although the court informed Mr. Carver that stand-by counsel was not a right, after the court then suspended the pro se colloquy to seek the defense expert's opinion on self-representation, at the next hearing, Mr. Carver immediately again asked for a stand-by lawyer. 6/2/11RP at 30-33; 6/17/11RP at 47 (“I just want to know if I can have a standby”). Unquestionably, his shifting perceptions of the proceedings against him were a factor in this confusion. Mr. Carver was not shown to adequately understand that he had no right to be assisted by a lawyer – a fundamental

“disadvantage” of self-representation.

Second, Mr. Carver’s request to proceed pro se was also not stated unequivocally. State v. Woods, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001); State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997). Here, it strongly appeared that the defendant was asking to be his own lawyer out of dissatisfaction with his recent unsuccessful efforts at obtaining a new lawyer. The pro se request followed his requests for a different lawyer, in which he complained his counsel was planning on an insanity defense. 5/4/11RP at 23, 25. Where a request for self-representation is motivated by mere dissatisfaction with counsel, it is not unequivocal, and should therefore be denied. See State v. Luvene, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995).

Finally, the court failed to consistently or correctly advise Mr. Carver of the maximum possible penalty. Mr. Carver was told three different things on different occasions regarding the maximum penalty he faced. On June 2, Mr. Carver was told he faced 31 to 32 years incarceration if he was convicted. 6/2/11RP at 31. On June 17, Mr. Carver was told that running the felonies and other counts consecutively could result in 17 years punishment. 6/17/11RP at 51. At the July 11 pre-trial hearing, when Judge Gonzalez was conducting a final pro se colloquy and asked about the defendant’s possible sentence, Mr. Carver stated that

he was “told at a[n] omnibus hearing the maximum penalty would be five years.” 7/11/11RP at 76. The prosecutor told the court it agreed, stating, “it’s five years on -- on each of the two felony counts, but other than that, same view.” 7/11/11RP at 76.

By definition, a majority of these advisements were incorrect, at a minimum. See RCW 9A.20.021(1)(c) (providing that no person convicted of a class C felony shall be punished in excess of five years confinement in a state correctional institution); 9A.46.110(5)(b)(i), (iii) (defining felony stalking as a class C felony); 9A.46.020(2)(b) (defining felony harassment as a class C felony). Mr. Carver faced two felony convictions, and conviction on three misdemeanor counts. CP 18-20.

The vacillating advisements to Mr. Carver regarding the maximum penalty affected the voluntariness of Mr. Carver’s request to represent himself. See State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001). The Court of Appeals has noted that when a defendant is otherwise “aware” of the 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. A criminal defendant “[can] not make a knowledgeable waiver of his constitutional right to counsel” where

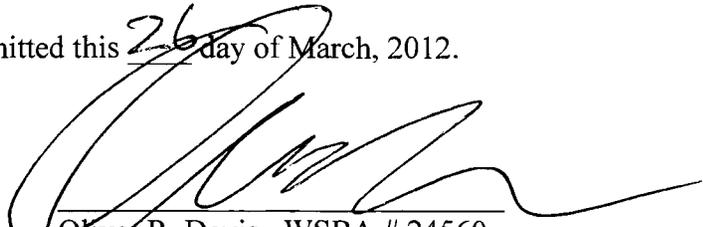
he “was never advised of the maximum possible penalties for the crimes with which he was charged.” State v. Silva, 108 Wn. App. at 541.

c. Reversal and remand is required. Courts should indulge in every reasonable presumption against waiver of the criminal defendant’s right to counsel. State v. Bebb, 108 Wn.2d at 525-26. The foregoing circumstances showed invalidity of Mr. Carver’s pro se request. This Court should reverse the trial court’s order allowing waiver of counsel and reverse Mr. Carver’s convictions.

E. CONCLUSION

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

Respectfully submitted this 26 day of March, 2012.



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