

No. 71393-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

BREE-ANN SMITH BRAZILLE

Appellant.

FILED  
COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON  
2014 JUN 24 PM 12:32

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

The Honorable Mark Prothero  
The Honorable Cheryl Carey  
The Honorable Patrick Oishi  
The Honorable Jay V. White  
The Honorable Elizabeth Berns

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APPELLANT'S OPENING BRIEF

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## **A. ASSIGNMENT OF ERROR**

The trial court erred in refusing to seal the competency evaluations prepared regarding defendant Bree-Ann Smith Brazille during proceedings prior to her plea of guilty.

## **B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Did Ms. Brazille possess a statutory right to seek sealing of the competency evaluations under RCW 10.77 *et seq.* in order to protect her important privacy interests?

2. Did the trial court err in refusing to seal the evaluations under GR 15, RCW 10.77 *et seq.*, and the factors of Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982)?

## **C. STATEMENT OF THE CASE**

Ms. Bree-Ann Smith Brazille was charged by an amended information with vehicle prowling. CP 62. On August 12, 2013, both defense counsel and the prosecutor agreed that Ms. Brazille should be briefly committed for evaluation of her competence to stand trial. 8/12/13RP at 3-5. The court also agreed, and ordered her to be committed to Western State Hospital for evaluation of competence, and for evaluation for civil commitment under RCW 71.05. 8/12/13RP at 4-5; CP 8-12.

During subsequent proceedings, Ms. Brazille, who appeared to suffer from certain stated personal pathologies, was deemed incompetent in two evaluations, and was later restored. Supp. CP \_\_\_\_, Sub # 30 (WSH evaluation report of August 23, 2013); CP 26-31 (WSH evaluation report of November 6, 2013). She ultimately entered a guilty plea. CP 44.

Defense counsel sought sealing of the two competency evaluations, because of concerns for their usage in possible future child custody or dependency proceedings, and argued that mere redaction of the documents would be inadequate. Supp. CP \_\_\_\_, Sub # 25 (motion to seal, 9/6/13); CP 36-42 (motion to seal, 12/4/13).

The trial court denied the motions. 9/25/13RP at 10-22; 12/18/13RP at 42-48; CP 23. Ms. Brazille appeals. CP 69-70.

#### **D. ARGUMENT**

##### **THE TRIAL COURT ERRED IN REFUSING TO SEAL MS. BRAZILLE'S COMPETENCY EVALUATIONS.**

(a) **Ms. Brazille was deemed incompetent by Western State Hospital by reports prepared and issued at several stages of the proceedings.** Due process would not have allowed Ms. Brazille to plead guilty, or to be sentenced, if she was

incompetent. 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; see generally 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)).

The trial court was required to and did order competency evaluations because there was reason to doubt Ms. Brazille’s competency. RCW 10.77.060(1)(a). These evaluations frequently involve inpatient commitment to a hospital or secure mental health facility, as Ms. Brazille’s did. See RCW 10.77.060(1)(d)-(f).

Early in the proceedings, the defense properly moved to seal the competency reports and other documents, under authority of GR 15, and under RCW 10.77.210. Supp. CP \_\_\_\_, Sub # 25; CP 36-42. Counsel recognized that under the recent case of State v. Chen, 178 Wn.2d 350, 309 P.3d 410 (2013), there is no *presumptive* right to the sealing of a competency evaluation, because such court records are deemed public and must be

accessible under the State Constitution. See Wash. Const. art. 1, sec. 10; Chen, 178 Wn.2d at 355; Supp. CP \_\_\_\_, Sub # 25; CP 36-42.

The court rejected the arguments to seal made under the court rules and the applicable statute, however, holding that under Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982), sealing was improper because the court deemed Ms. Brazille's interest in the report not being used in a future child custody or dependency proceeding to be hypothetical. The court stated there was no serious imminent threat to her right of privacy, sealing would be an overbroad action, and the presumption of openness of court records outweighed any interest. 9/25/13RP at 20-22; 12/18/13RP at 45-47.

Ms. Brazille respectfully argues that the court abused its discretion and that RCW 10.77 and the Ishikawa factors did require sealing of the competency reports. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Ms. Brazille's interest was serious and greatly outweighed any public right to access her extensive competency reports that had nothing to with a minor criminal offense not involving her mental health.

**(b) Sealing the competency reports was proper under RCW 10.77.210 and GR 15, and the trial court erred in holding that the *Ishikawa* factors did not allow sealing.** The competency evaluations prepared in this case should have been sealed to protect Ms. Brazille's privacy. As an initial matter, Ms. Brazille sought sealing within the current framework that recognizes the presumption that court records are public, and argued she nevertheless had a countervailing individual and important interest in sealing the evaluation. CP 38-43; 9/25/13RP at 13-14; 12/18/13RP at 43-44.

On September 5, 2013, the Washington Supreme Court ruled that there is not a presumptive right to seal a competency evaluation. State v. Chen, supra, 178 Wn.2d at 358. Chen held, however, that a competency evaluation may indeed be sealed if there is a justified basis for an individual finding in favor of sealing. The Court stated,

This is not say that sealing is inappropriate in all cases but only that trial courts should recognize the important constitutional interests and follow the analysis outlined in the Ishikawa line of cases.

Chen, 178 Wn.2d at 358.

First, counsel initially argued for sealing under the court rules. General Rule (GR) 15 establishes the procedures and

standards for sealing court records, providing in pertinent part as follows in section (c)(2):

**(c) Sealing or Redacting Court Records.**

- \* \* \*
- (2) After the hearing, the court may order the court files and records in the proceeding, or any part thereof, to be sealed or redacted if the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record. Agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records. Sufficient privacy or safety concerns that may be weighed against the public interest include findings that:
- (A) The sealing or redaction is permitted by statute, or
  - (B) The sealing or redaction furthers an order entered under CR 12(f) or a protective order entered under CR 26(c); or
  - (C) A conviction has been vacated; or
  - (D) The sealing or redaction furthers an order entered pursuant to RCW 4.24.611; or
  - (E) The redaction includes only restricted personal identifiers contained in the court record; or
  - (F) Another identified compelling circumstance exists that requires the sealing or redaction.

GR 15. Here, the request to seal met sections (E) and (F), at a minimum. Ms. Brazille, through counsel, identified specific privacy concerns and did so early in the proceedings. Dr. Deanna Frantz, one of the doctors at Western State Hospital, contacted defense counsel about the evaluation and indicated that Ms. Brazille was concerned about the competency report becoming part of the

public record. Ms. Brazille is a mother. She was concerned that the information in the competency evaluation could be used to challenge child custody. CP 39-40; 9/25/13RP at 13-4; 12/18/13RP at 43-44.

Further, counsel showed circumstances warranting individualized findings that would satisfy the Chen decision and its directive to courts to address the Ishikawa considerations.<sup>1</sup>

Ishikawa established five factors to be considered in determining whether a court record (or hearing) can be closed to the public or whether documents should not be sealed:

- (1) The proponent of closure and/or sealing must make some showing of the need therefore;
- (2) Anyone present when the closure [and/or sealing] motion is made must be given an opportunity to object to the [suggested restriction];
- (3) The court, the proponents and the objectors should carefully analyze whether the requested method for curtailing access would be both the least restrictive means available and effective in protecting the interests threatened;
- (4) The court must weigh the competing interests of the defendant and the public, and consider the alternative methods suggested; and
- (5) The order must be no broader in its application or duration than necessary to serve its purpose[.]

See Ishikawa, 97 Wn.2d at 37-39.

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<sup>1</sup> Article I, section 10 of the Washington Constitution requires that all court proceedings be open to the public. GR 15 does not meet that constitutional requirement standing alone and it must be construed in conjunction with the standards established in Ishikawa. See also State v. Waldon, 148 Wn. App. 952, 202 P.3d 325 (2009).

Importantly, the decision held that there is a clear right of public access to court proceedings, but noted, however, that "it is equally clear that the public's right of access is not absolute, and may be limited to protect other interests." Ishikawa, at 37-39.

In assessing the first Ishikawa factor, the moving party has the burden of establishing that a "serious and imminent threat" to some important interest exists. Ishikawa, at 37.

In Ms. Brazille's case, her individual interest to keep the information in the competency evaluation confidential and private from the father of her child, his family, Ms. Brazille's family, and/or other governmental authorities outweighed the public's general right to access court records.

It is appropriate and legislatively contemplated that the father of Ms. Brazille's child and his family would not be allowed access to these sorts of records. RCW 10.77.210 states that records and reports prepared pursuant to RCW 10.77 shall be disseminated only to individuals identified in the statute, and even then only upon request:

Except as provided in RCW 10.77.205 and 4.24.550 regarding the release of information concerning insane offenders who are acquitted of sex offenses and subsequently committed pursuant to this chapter, all records and reports made pursuant to this chapter, shall be made available only upon request,

to the committed person, to his or her attorney, to his or her personal physician, to the supervising community corrections officer, to the prosecuting attorney, to the court, to the protection and advocacy agency, or other expert or professional persons who, upon proper showing, demonstrates a need for access to such records. All records and reports made pursuant to this chapter shall also be made available, upon request, to the department of corrections or the indeterminate sentence review board if the person was on parole, probation, or community supervision at the time of detention, hospitalization, or commitment or the person is subsequently convicted for the crime for which he or she was detained, hospitalized, or committed pursuant to this chapter.

Emphasis added.) RCW 10.77.210 (emphasis added).

Ms. Brazille does not lose her privacy rights because she is charged with a general crime. While a criminal defendant's reasonable expectation of privacy is lessened while she is in custody, she does not lose all privacy rights. State v. Puapuaga, 164 Wn.2d 515, 520–21, 192 P.3d 360 (2008). RCW 10.77 addresses procedures for mentally ill defendants and RCW 10.77.210 clearly enumerates the privacy rights a defendant has in the reports and records prepared when addressing a defendant's mental illness. The statute makes no distinction between in-custody and out-of-custody defendants and grants significant privacy rights to all mentally ill defendants regardless of their custody status.

Importantly, the court must also consider the nature of the proceeding when balancing a defendant's rights against the public. The public has a right of access to witness all criminal prosecutions, but the nature of the specific proceeding is relevant in determining the scope of the right. Clearly, the public has a paramount right to attend a trial, in which the facts and circumstances of the offense itself are the main focus. But the competency facts at issue below did not involve any aspect of the crime itself. There is a significant distinction between a court record in which the criminal acts are the primary topic, which the community at large has an interest in, and a document or hearing addressing the defendant's private mental health matters.

Here, the focus of the records sought to be sealed below was Ms. Brazille's mental competency. Certainly, issues like child custody were of course not at issue. For example, Ms. Brazille's child was not involved in this particular crime. There was also no evidence that mental illness played a role regarding her mental state on April 28, 2013, the date of the crime. Insanity and/or diminished capacity are not *per se* established by a finding of incompetency. The evaluations, however, could be used to claim that there is clear, cogent, and convincing evidence that the welfare

of her child may be endangered. See RCW 13.04.10. Per RCW 10.77.210, Ms. Brazille's family, the father's family, or even DSHS should not have access to the information in the evaluations. By not sealing the evaluations, however, those parties, not authorized by statute, could access it.

The second Ishikawa factor authorizes the court to allow other individuals the opportunity to object to the sealing or closure, which opportunity the trial court properly found had been provided.

The third Ishikawa factor examines whether sealing or closure is the least restrictive alternative. In this regard Ms. Brazille sought only to seal the reports that were prepared as part of the restoration or evaluation of her competence. Additionally, the defendant did not seek absolute privacy by advocating for the closing of any competency hearing.

The fifth Ishikawa factor requires that the sealing or closure not be broader than necessary to accomplish the stated goal. Here, the defense request below was narrowly tailored and addressed only those documents which contained confidential mental health information.

Finally, of course, the fourth factor requires that the court must weigh the competing interests of the defendant and the

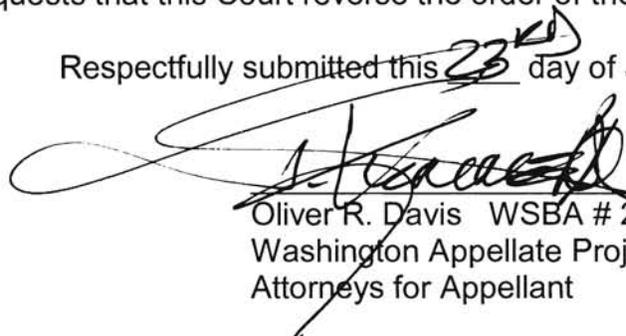
public, and consider the alternative methods of closure suggested. Here, to begin with, the prosecutor did not show why redaction would be an adequate method of protecting the privacy of the all of the information in question. Indeed, defense counsel explicitly declined to seek redaction in the alternative to sealing, because redaction would have been inadequate, especially where a party or attorney in the future would seek both documents to be un-redacted if they were obtained without being filed under seal. 12/11/13RP at 29-30.

The entirety of the competency evaluations contained information that was private so as to present an individualized and compelling need for sealing under GR 15(c)(2)(A) and RCW 10.77.210, and neither Chen nor Ishikawa disallowed that sealing. Ms. Brazille argues that the court's ruling should be reversed.

#### **E. CONCLUSION.**

Based on the foregoing, Bree-Ann Smith Brazille respectfully requests that this Court reverse the order of the trial court.

Respectfully submitted this <sup>23<sup>rd</sup></sup> day of June, 2014.

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71393-1-I
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	)	
BREE-ANN SMITH-BRAZILLE,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23<sup>RD</sup> DAY OF JUNE, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |  |                   |  |
|--|-------------------|--|
| <input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY<br>APPELLATE UNIT<br>KING COUNTY COURTHOUSE<br>516 THIRD AVENUE, W-554<br>SEATTLE, WA 98104 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____  |
| <input checked="" type="checkbox"/> BREE-ANN SMITH-BRAZILLE<br>(NO VALID ADDRESS)<br>C/O COUNSEL FOR APPELLANT<br>WASHINGTON APPELLATE PROJECT                   | ( )<br>( )<br>(X) | U.S. MAIL<br>HAND DELIVERY<br>RETAINED FOR<br>MAILING ONCE<br>ADDRESS OBTAINED |

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**SIGNED** IN SEATTLE, WASHINGTON THIS 23<sup>RD</sup> DAY OF JUNE, 2014.

X \_\_\_\_\_ 

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