

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

P.E.T.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL C. HAYDEN

**SUPPLEMENTAL BRIEF OF RESPONDENT
FOLLOWING REMAND**

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COURT OF APPEALS
STATE OF WASHINGTON
CLERK

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JAMES M. WHISMAN
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES

This Court has asked the parties to file supplemental briefs not exceeding ten pages on the following two questions:

- 1) What effect does State v. Coley¹ have on the disposition of this case?
- 2) What effect does the prior order of incompetency of P.E.T. have on who bears the burden of proof of incompetency at the initial hearing on incompetency under RCW 10.77.060, et al?

B. FACTS

P.E.T. was deemed incompetent in criminal proceedings conducted in 2009 so criminal charges were dismissed. About one year later, P.E.T. committed a robbery on a bus and new charges were filed. The new case was wholly unrelated to the 2009 case. During proceedings on the new charges, P.E.T.'s competency was questioned, the trial court ordered an evaluation at Western State Hospital (WSH), two experts examined him, and one expert testified that he was competent. The trial court ruled that P.E.T. had failed to prove that he was not competent. P.E.T. was convicted by the court following a bench trial.

This Court held, based on the decision in State v. Coley, 171 Wn. App. 177, 286 P.3d 712 (2013), that the burden of proving competency shifted to the State once a defendant had been found

¹ 180 Wn.2d 543, 326 P.3d 702 (2014).

incompetent, even if the finding occurred in a former proceeding. The State filed a petition for review and the petition was stayed while the supreme court reviewed State v. Coley. After Coley was decided, the State's petition for review in this case was granted, and the matter was remanded to this Court for reconsideration in light of the new Coley decision.

C. SUPPLEMENTAL ARGUMENT

1. STATE V. COLEY REQUIRES THAT THE TRIAL COURT'S ORDER DETERMINING COMPETENCY BE AFFIRMED.

State v. Coley dictates the result in this case. The Supreme Court held that a party challenging competency always has the burden to rebut the presumption of competency.

Reading [10.77 RCW] as a whole, it is clear that the legislature did not intend to create different procedures for initial competency determinations and competency restoration hearings. Instead, the legislature created a comprehensive scheme for evaluating a defendant's competency, with a closely regulated cycle of treatment and evaluation followed by a judicial determination of competency. The scheme is intended to ensure the defendant's competency, whenever questioned, so he may be tried, but it recognizes the defendant's interest in being free from involuntary mental health commitment and treatment. We disagree with Coley's assertion that the statute distinguishes between a competency hearing and a competency restoration hearing. Indeed, the question is the same in each hearing: the defendant's competency.

Contrary to Coley's contention, we conclude that the burden of proof placement does not depend on a distinction between a competency hearing and a restoration hearing.

Although chapter 10.77 RCW does not explicitly assign the burden of proof to either party, we interpret the statutes to place the burden on the party challenging competency. . . . RCW 10.77.086 asks the court to determine, by a preponderance of the evidence, whether the defendant is incompetent. So, although the overriding question is restoration, the court must answer that question by considering whether a preponderance of the evidence suggests that the defendant is incompetent. The party challenging competency has the incentive to present this preponderance of evidence. The party arguing that the defendant is competent to stand trial merely defends against any assertions of incompetency presented by the opposing party.

Coley, 180 Wn.2d at 554-55 (footnotes omitted). The court observed that its holding was consistent with similar decisions that had placed the burden on the party challenging competency of witnesses and of defendants convicted of capital murder and facing a death sentence. Id.

Thus, the answer to this Court's first question is that Coley controls the disposition of this case. P.E.T. was charged with a felony, his competency was at issue, the trial court followed the statutory procedures under chapter 10.77 RCW, the court assigned the burden of proof to P.E.T. since he was challenging his competency, and the trial court made a finding based on all the evidence presented. Thus, in all pertinent respects, the trial court's ruling was comparable to the ruling in Coley.

2. A PERSON CLAIMING INCOMPETENCY HAS THE BURDEN OF PROOF EVEN IF THERE WAS AN ORDER FINDING HIM INCOMPETENT IN A PRIOR CASE.

There is one way, however, in which P.E.T.'s situation differed from Coley's—a judge in a previous case had ruled that P.E.T. was not competent to stand trial, whereas there was no such finding in Coley. This distinction is immaterial, however, because competency is determined on a case-by-case basis under the strictures of RCW 10.77. When there is a question as to a defendant's competency in any given proceeding, the burden of proof does not shift depending on whether he was earlier incompetent.

This Court held in P.E.T. that the burden of proving competency shifts to the State once a defendant has been found incompetent, even if that finding occurred in a prior case. The decision was based on the reasoning of the Court of Appeals in Coley and on a common law presumption applied in insanity cases.

We agree with Division Three's rationale in Coley. In the absence of any statement in the statutes of who bears the burden of proof at a competency hearing, it is logical to apply the common law presumption to the statutes to fill this gap. ...

* * *

...A court previously determined that Tate was incompetent in 2009. That determination created a common law rebuttable presumption that he remained so at the time of the initial competency hearing in this case in 2011. The trial court incorrectly placed the burden of proof on Tate to prove that he

remained incompetent. The burden should have been placed on the State to rebut the presumption of incompetency that arose from the prior adjudication of incompetency.

P.E.T., at 597-98. This Court deemed it significant that “there was an actual adjudication that Tate was incompetent to stand trial in 2009.”

Id. at 599. This reasoning cannot be reconciled with the logic of the Supreme Court’s decision in Coley.

As with many criminal defendants suffering some form of mental illness, Coley went through phases of both competency and incompetency as his case was adjudicated. Coley, at 548-50. He argued that after it became apparent that he was not competent and he was sent to a state hospital for treatment, the usual presumption of competency was gone, and the burden shifted to the State to prove that competency had been restored. Id. at 552-53. The Supreme Court rejected this argument. It held that the context of the statutory language, related provisions, and the entire statutory scheme showed that there was no meaningful distinction, for purposes of assigning the burden of proof, between a “competency” hearing and a “restoration” hearing. Id. at 553. The ultimate question is always whether the defendant is competent to stand trial in the proceedings at hand. Thus, the court concluded, as quoted at length above, that “the legislature did not intend to create different procedures for initial competency determinations and competency restoration hearings.

Instead, the legislature created a comprehensive scheme for evaluating a defendant's competency, with a closely regulated cycle of treatment and evaluation followed by a judicial." Id. at 554. "[A]lthough the overriding question is restoration, the court must answer that question by considering whether a preponderance of the evidence suggests that the defendant is incompetent." Id. In other words, a shift in the defendant's mental condition does not require a shift in the burden of proof; the person alleging that a defendant is not competent in a given proceeding bears the burden of proving that allegation.

This interpretation of the court's decision was recognized by the dissent. See Coley, at 564 (Gordon-McCloud, J. dissenting) ("I ... disagree with the majority's decision that the burden of proof always lies with the party challenging competency."). The dissent argued that once the court had previously made a finding of incompetency, the burden to prove otherwise should shift to the State. Id. Plainly, the majority rejected the notion that a prior determination that the defendant was not presently competent required a shift in burden.

There is no reason to take a different approach where, as here, a defendant was found incompetent in a different case one year earlier. If there is no difference in assigning the burden of proof as between restoration and competency, there surely is no difference between

assigning the burden of proof from a finding of incompetency in one case to a finding of competency (or not) in a subsequent case. The ultimate question is whether a defendant is presently competent to face the current proceedings, and the statutory provisions in chapter 10.77 RCW will guide the court's decision. Those provisions assign the burden to the party challenging the presumption of competence, even if the court has found—in this proceeding or before—that the defendant was not competent.

Moreover, the Supreme Court observed in Coley that it makes sense to assign the burden of proof to the person challenging competency because of “the fluid character of the question of competency.” Coley, at 555. Competency is certainly fluid within a given case; it is even more fluid *across* cases separated by almost a year. There is no reason to carry a presumption of incompetency over a one-year period where the same presumption is not carried over a matter of days, weeks, or months within a single proceeding.

Also, this Court's decision in P.E.T. depended on an analogy to a common law rule, but that rule is simply inapposite in the context of proceedings held pursuant to RCW 10.77.050. This Court held that, just as insanity should be presumed once determined, so too should incompetency be presumed once determined. P.E.T., at 596 (citing State v. Platt, 143 Wn.2d 242, 251 n.4, 19 P.3d 412 (2001); In re Estate of

Miller, 10 Wn.2d 258, 268, 116 P.2d 526 (1941); Criez v. Sunset Motor Co., 123 Wash. 604, 606, 213 P. 7 (1923); In re Estate of Peter, 43 Wn.2d 846, 862, 264 P.2d 1109 (1953)). These cases all dealt with insanity, not competency, and none dealt with proceedings under RCW 10.77. The Supreme Court's decision in Coley made clear that a state statute comports with due process if it requires a defendant to prove he is incompetent. Coley, at 557-59. Thus, the question presented was wholly a question of statutory interpretation. Id. at 551 ("...the burden of proof at a competency hearing is an issue of statutory interpretation that is reviewed de novo."). A common law provision on the burden of proving insanity cannot trump a conflicting statutory scheme that assigns that burden differently as to competency proceedings. Cf. RCW 9A.04.060 (common law may supplement the penal statutes "insofar as not inconsistent" with those statutes). Thus, the common law principle relied earlier upon by this Court should not be applied to P.E.T.'s case.

Finally, as argued earlier, a presumption of incompetency that carries over from one case to another would be difficult or impossible to implement, making it even less unlikely that the legislature intended to create such a shifting presumption. See Motion to Reconsider, at 7-8. Defendants are prosecuted in different states, counties and cities, and sometimes prosecutions are separated by years or decades. It would be

exceedingly difficult to track all of these prosecutions in a manner that will tell a trial court judge on any given date whether a defendant has previously been adjudicated as incompetent.

3. A STATUTE DOES NOT INTRUDE ON JUDICIAL
AUTHORITY BY ASSIGNING A BURDEN OF PROOF.

P.E.T. makes no effort in his supplemental brief to distinguish Coley or to show that a finding of incompetency in a prior proceeding requires that the State prove competency in the new proceeding. Rather, he argues that chapter 10.77 RCW violates separation of powers principles because it essentially demands that a trial judge find competency regardless of the evidence. P.E.T. is mistaken, Coley does not order trial judges to rubberstamp an expert's opinion. P.E.T.'s argument depends on blurring the distinction between a *presumption* of competency and a *finding* of competency. Coley makes clear that the trial judge is to determine competency based on all the facts and circumstances of the case. The legislature has not directed courts to find defendants competent. The legislature has simply said competency is presumed and that a person challenging competency must show more probably than not that a defendant is incompetent. A trial court will consider that challenge in light of all the relevant evidence and will make a finding as to

competency. There is no violation of separation of powers principles in such a scheme.

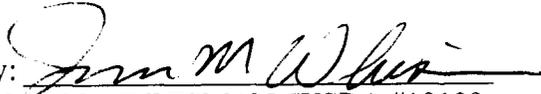
D. CONCLUSION

The trial court properly placed on P.E.T. the burden to show that he was not competent. The fact that he was incompetent in a previous case does not shift the burden of proof to the State. For these reasons, the State respectfully asks this Court to affirm P.E.T.'s robbery conviction.

DATED this 9th day of January, 2015.

Respectfully submitted,

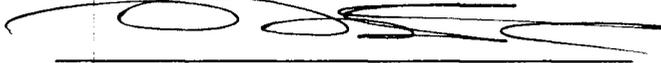
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Gregory Link, greg@washapp.org, containing a copy of the **SUPPLEMENTAL BRIEF OF RESPONDENT FOLLOWING REMAND**, in STATE V. P.E.T., Cause No. 68068-4-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

01-09-15
Date