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Washington State
Court of Appeals
Division Two

May 2, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STEVEN GLEN THURMAN, Appellant.	No. 48699-7-II UNPUBLISHED OPINION

LEE, J. — Steven Thurman was convicted of three counts of assault in the third degree for swings he took at hospital personnel and kicks he levied at a responding police officer. On appeal, he argues he received ineffective assistance of counsel because his attorney did not request a competency evaluation after reviewing a Drug Offender Sentencing Alternative (DOSA) evaluation and hearing Thurman's statements at his sentencing. He also asks us to decline imposing appellate costs if they are sought by the State.

We hold that Thurman's ineffective assistance of counsel claim fails because nothing in the DOSA or Thurman's statement at sentencing implicates Thurman's competency, and we do not consider an award of appellate costs at this juncture. Therefore, we affirm.

FACTS

A. BACKGROUND AND TRIAL

Thurman entered a nail salon in Centralia, Washington, apparently intoxicated and drinking a beer. When he refused to leave, law enforcement was called. Law enforcement transported Thurman to the hospital for a medical evaluation.

At the hospital, Thurman was treated by a nurse. When the nurse bent down to retrieve the blood pressure cuff and oxygen saturation measuring device that Thurman had thrown to the ground, Thurman swung his fist at her, catching her scrub jacket across the belly.

After that incident, Dr. Susan Derry and her medical scribe Christoffer Amdahl entered the room Thurman was in. Dr. Derry asked Thurman several questions, to which Thurman responded, "Leave me alone" and "let me sleep." Verbatim Transcript of Proceedings (VTP) (Jan. 20, 2016) at 60. Dr. Derry asked Thurman to open his eyes, at which point Thurman "opened his eyes, looked at me [Dr. Derry], and then with his right hand tried to swing at me, but I ducked out [of the way]. And so then he saw me duck away, so he tried to back hand grab in the direction that I was ducking away." VTP (Jan. 20, 2016) at 60.

Law enforcement was contacted again, and Officer Mike Lowrey responded. After Thurman was medically cleared, Officer Lowrey arrested Thurman for the swings Thurman took at the nurse and doctor.

When Thurman was placed in the patrol car, he began kicking the driver's side rear window, causing the window to bow outward several times. Officer Lowrey opened the door to tell Thurman to stop. Thurman began kicking at Officer Lowrey, kicking Officer Lowrey's hand when Officer Lowrey would reach in try to get Thurman to stop. Officer Lowrey was able to get

a hold of Thurman and pulled him out of the car. In doing so, Thurman suffered abrasions to his arms. Thurman was taken back into the hospital, and the abrasions on his arms were treated and bandaged.

The State charged Thurman with three counts of third degree assault. Thurman pleaded not guilty, and the case proceeded to a jury trial. The jury convicted Thurman as charged.

B. SENTENCING

The sentencing court ordered a pre-sentence evaluation to determine whether Thurman was eligible for a DOSA. The DOSA evaluation determined that Thurman "is not eligible for a DOSA sentence due to: Mental Health may be a primary issue, would benefit from MH evaluation." Clerk's Papers (CP) at 81. The DOSA evaluation continued that Thurman would not benefit from treatment as he wanted to continue to drink alcohol because he "love[d] it" and "d[id]n't have a problem." The evaluation further noted that Thurman "was focused on suing the police department and had to be re-directed continuually [sic]." CP at 82. Finally, the DOSA evaluation stated that Thurman

> reports he was diagnosed with anxiety and depression. He was suicidal during the assessment stating[,] "I don't care if I live or die[.]" When asked when he last thought about suicide he replied he thinks about it every day[.] When asked if he had a plan to end his life he stated he would drink a bottle of whiskey and take sleeping pills and if [they were] available right now he would end it. Jail staff was notified and Cascade MH was called. Client would rant about suing the police department and would become extremely agitated.

CP at 82.

During the sentencing hearing, Thurman made the following statement to the sentencing court:

> Your Honor, I wouldn't make a story up about being tased. He tased me. I have the scars to prove it. He took me to the hospital. I had bandages on both arms. Why he drug me, I don't know. I didn't do anything. I was merely smoking a cigarette across the street, from there I was going to go down to the post office. From there I was going down to Destiny where I had my suitcases, and that was my intentions. And from there I planned on going back to Morton where I lived there for over 25 years. And I've got friends there. That's what my intentions are when I get out, is go back to Morton, go back to the mountains.

VTP (March 2, 2015) at 188-89.

The sentencing court sentenced Thurman to fourteen months on each count to run concurrently. Thurman appeals.

ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Thurman argues he received ineffective assistance of counsel when his attorney failed to request a competency evaluation prior to his sentencing. We disagree.

1. Legal Principles

a. Ineffective Assistance of Counsel

The right to effective assistance of counsel is afforded criminal defendants by the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. *Strickland v. Washington*, 466 U.S. 668, 685–86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). "To provide constitutionally adequate assistance, 'counsel must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client.'" *In re Pers.*

Restraint of Fleming, 142 Wn.2d 853, 866, 16 P.3d 610 (2001) (emphasis omitted) (alterations in original) (quoting *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir.1994)).

To establish ineffective assistance of counsel, Thurman must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). There is a strong presumption of effective assistance, and Thurman bears the burden of demonstrating the absence of a legitimate strategic or tactical reason for the challenged conduct. *McFarland*, 127 Wn.2d at 336. To show prejudice, Thurman must demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* at 335. If Thurman fails to satisfy either prong, we need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

b. Competency

The due process clause of the Fourteenth Amendment to the United States Constitution prohibits the conviction of a person not competent to stand trial. *Fleming*, 142 Wn.2d at 861; *Drope v. Missouri*, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975). The federal "constitutional standard for competency to stand trial is whether the accused has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and to assist in his defense with 'a rational as well as factual understanding of the proceedings against him.'" *Fleming*, 142 Wn.2d at 861-62 (quoting *Dusky v. United States*, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)). But, "Washington law affords greater protection by providing that '[n]o

incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.'" *Id.* at 862 (quoting RCW 10.77.050) (alteration in original).

In Washington, "'[i]ncompetency' means a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect." RCW 10.77.010(15). "When defense counsel knows or has reason to know of a defendant's incompetency, tactics cannot excuse failure to raise competency at any time 'so long as such incapacity continues.'" *Fleming*, 142 Wn.2d at 867 (quoting RCW 10.77.050).

2. No Request For Competency Evaluation

Thurman argues his counsel was deficient for failing to request a competency evaluation and that he was prejudiced by that failure. Specifically, Thurman contends that the information in the DOSA evaluation and Thurman's statements at sentencing should have alerted defense counsel to request a competency evaluation. We hold Thurman fails to establish that his attorney was deficient by not requesting a competency evaluation.

In *Fleming*, the court held that that defense counsel was ineffective because defense counsel knew of psychological evaluations concluding that Fleming was incompetent to stand trial, but did not provide the court with the evaluations or raise the issue of competency prior to Fleming entering a plea of guilty. *Id.* at 858-59, 866-67. The court found that defense counsel's representation fell below an objective standard of reasonableness because the psychological evaluations provided an abundance of reason to suggest that Fleming was incompetent. *Id.* at 866-67. For example, the first report concluded that Fleming was psychotic at the time of the crime and "marginally competent" to stand trial, and the second report concluded that Fleming was "incompetent" to stand trial. *Id.* at 858. The court held that had the trial court been apprised of

these conclusions, the outcome, which was the acceptance of the plea at that time, would likely have been different. *Id.* at 867.

Here, unlike the psychological evaluations in *Fleming*, which expressly alerted defense counsel that their client had been diagnosed as "marginally competent" and "incompetent" to stand trial, nothing in the DOSA evaluation nor Thurman's statement at sentencing touched on Thurman's ability to understand the proceedings against him or participate in his defense. The DOSA evaluation noted that Thurman reported having been diagnosed with anxiety and depression, had suicidal ideations during the evaluation, and "was focused on suing the police department." CP at 82. The DOSA evaluation concluded that Thurman was not eligible for a DOSA sentence because his mental health might be the primary issue and recommended a mental health evaluation.

Thurman does not argue nor provide authority that being diagnosed with anxiety and depression should prompt defense counsel to request a competency evaluation. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193, 195 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none."). Thurman also does not argue that his reported anxiety and depression, his suicidal thoughts, and his intention to sue the police department in fact inhibited or interfered with his understanding of the proceedings against him or his participation in his defense.

Similarly, nothing in Thurman's statement to the sentencing court implicates his ability to understand the proceedings against him or his ability to participate in his defense. Instead, Thurman maintained his innocence, alleged police misconduct, accurately described the injuries he sustained to his arms when the police dragged him out of the patrol car, and said what he had intended to do before being arrested and what he intended to do when he was released from prison.

That Thurman maintained his innocence and provided a different account of his arrest and reasons for the injuries he sustained does not mean he lacked the capacity to understand the proceedings against him or assist with his defense. Such a holding would require defense counsel to request a competency hearing every time a client professes innocence and proffers an alternative account of the events. Therefore, because nothing in the DOSA evaluation or Thurman's statement to the sentencing court contemplates Thurman's ability to understand the proceedings against him or his ability to participate in his defense, we hold Thurman's ineffective assistance of counsel claim fails because he has not shown his attorney's performance fell below the objective standard of reasonableness.

B. APPELLATE COSTS

Thurman requests that we decline to impose appellate costs against him if the State prevails on this appeal and makes a proper request. We refer the matter of appellate costs to a commissioner of this court for determination under the recently revised RAP 14.2 if the State decides to file a cost bill.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, J.

Bjorgen, C.J.