IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID LEE BOLDUC, JR., Appellant.	No. 42466-5-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — David Lee Bolduc appeals his plea-based conviction arguing that the trial court incorrectly found him competent to enter a *Alford/Newton*[1] plea to a reduced charge in accord with a plea agreement. Because the trial court did not err in accepting Bolduc's knowing and voluntary plea, we affirm.[2]

FACTS

On December 27, 2010, the State charged Bolduc with second degree assault, harassment, obstructing a law enforcement officer, and third degree malicious mischief. The charges arose from an incident in which Bolduc was drinking in an apartment with Jonathan Dean and threatened Dean with a hatchet. Bolduc struck Dean's hand and Dean's apartment door with the hatchet. When police arrived, Bolduc barricaded himself in the his apartment and the SWAT team ultimately forcibly removed him several hours later.

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[1] *See North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970); *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

[2] A commissioner of this court initially considered this appeal as a motion on the merits under RAP 18.14 and then referred it to a panel of judges.

The superior court ordered a competency evaluation. On February 14, 2011, the court found Bolduc competent. The court, however, ordered a second evaluation on February 23, 2011. At a hearing on March 10, 2011, the court reviewed the second evaluation and concluded Bolduc was not competent to stand trial. The court noted that Bolduc's physicians raised "some issues about [his] compliance with medications." Report of Proceedings (RP) (Mar. 10, 2011) at 3. The court remanded Bolduc to the custody of Western State Hospital's forensic unit for 90 days for competency restoration.

On June 17, 2011, the superior court reviewed a report of Dr. Gregg Gagliardi from Western State Hospital and found Bolduc competent to stand trial. Dr. Gagliardi reported that Bolduc resumed taking medication and scored "within normal limits" on the competency test. The report states:

> [T]he defendant has been clinically stable for at least one month. It is anticipated that his stability can be maintained as long as he continues to comply with psychotropic medication.

Clerk's Papers (CP) at 83.

On July 12, 2011, the State amended Bolduc's charges to one count of second degree assault. Bolduc entered an *Alford/Newton* plea to the charges. He signed a written plea statement. In the plea proceeding, Bolduc's counsel noted the competency determination of June 17, but informed the superior court "there still are mental health issues. Just because he's found competent doesn't mean that it alleviates everything." RP (July 12, 2011) at 3. The court interjected, "I'm fully aware of that." RP (July 12, 2011) at 3. Counsel then continued, "So I think we're going to have to go through this plea a little bit slower than usual." RP (July 12,

2011) at 3.

Counsel stated that he reviewed the plea agreement with Bolduc and explained the charge is a strike offense. Counsel further stated, "I've made sure he understands." RP (July 12, 2011) at 4. The court then explained the recommended sentence and defense counsel stated Bolduc "understands the state's recommendation." RP (July 12, 2011) at 5. Bolduc's counsel also confirmed "the other rights that [Bolduc] loses." RP (July 12, 2011) at 5. Counsel concluded:

> So I believe that this is a knowing and voluntary plea to the extent that Mr. Bolduc has indicated to me that he's getting everything I'm saying. *But I'd ask that the Court make that finding*.
>
> I don't believe that anyone has threatened or promised him or is forcing him to do this. . . . We ask that the Court finds that this is a knowing and voluntary plea.

RP (July 12, 2011) at 6 (emphasis added).

The superior court then addressed Bolduc directly. Bolduc correctly stated his birthday and informed the court that he attended school through the 11th grade but did not remember whether he finished the grade. The court advised him of his constitutional rights. Bolduc at first stated that his counsel told him he did not have the right to remain silent. The court advised him that he did have the right to remain silent and Bolduc waived that right as well as his other rights.

Bolduc had no substantive questions about the charge or the sentence. The superior court next reviewed Bolduc's statement regarding his plea in which he acknowledged, "I've discussed the evidence with my attorney, and I believe there is a substantial likelihood that I could be convicted if I had a trial." RP at 14. Bolduc stated that this was a true and correct statement. Bolduc then entered his plea and the court accepted it.

The superior court proceeded to sentence Bolduc to six months in custody, with credit for time served, and 12 months of community custody. The court also ordered a mental health evaluation. The court asked whether Bolduc remained on medication. Bolduc's counsel stated that Bolduc remains on medication and is "complying" and "stabilized."

Bolduc appeals, arguing that the superior court erred in accepting his plea "without a competency hearing where there was reason to doubt his competency." Br. of Appellant at 1.

ANALYSIS

"No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." RCW 10.77.050. "The two-part test for legal competency for a criminal defendant in Washington is as follows: (1) whether the defendant understands the nature of the charges; and (2) whether he is capable of assisting in his defense." *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 862, 16 P.3d 610 (2001). The level of competency required to stand trial and to plead guilty are the same. *Godinez v. Moran*, 509 U.S. 389, 400-01, 113 S. Ct. 2680, 125 L.Ed.2d 321 (1993) (Kennedy, J., concurring in part and concurring in judgment).

We review a trial court's decision on competency under the abuse of discretion standard. *State v. Ortiz*, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985). "An abuse of discretion occurs only 'when no reasonable judge would have reached the same conclusion.'" *State v. Hager*, 171 Wn.2d 151, 156, 248 P.3d 512 (2011) (quoting *State v. Bourgeois*, 133 Wash.2d 389, 406, 945 P.2d 1120 (1997)). "The trial judge may make his [competency] determination from many things, 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). The critical period for determining the mental condition of the defendant is when the guilty plea is entered. *State v. Osborne*, 102 Wn.2d 87, 98, 684 P.2d 683 (1984) (citing *State v. Ashley*, 16 Wn. App. 413, 416, 558 P.2d 302 (1976)).

Bolduc's claim that he was not competent to plead guilty is essentially a challenge to the voluntariness of his guilty plea. *See State v. Marshall*, 144 Wn.2d 266, 281, 27 P.3d 192 (2001), *abrogated by State v. Sisouvanh*, No. 85422-0, 2012 WL 4944801 (Wash. Oct. 18, 2012). Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)); *see also* CrR 4.2(d) (trial court "shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea"). A plea entered by an incompetent individual is necessarily invalid.

When a competent defendant signs a written statement on plea of guilty in compliance with CrR 4.2(g), acknowledges reviewing that statement, and then participates in an extensive colloquy with the trial court, the presumption of voluntariness is "'well nigh irrefutable.'" *State v. Branch*, 129 Wn.2d 635, 642 n. 2, 919 P.2d 1228 (1996) (quoting *State v. Perez*, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982)). Bolduc signed a written statement and appeared in open court to discuss his plea. He nevertheless argues, however, that defense counsel's concerns raised during the plea hearing and Bolduc's "apparent confusion" during the hearing "gave the court reason to doubt his competency" and render his plea involuntary. Br. of Appellant at 7. We

disagree.

With respect to counsel's expressed concerns, the record reflects that at the plea hearing defense counsel informed the superior court that Bolduc suffered from ongoing mental health issues. The mere presence of psychological issues, however, does not automatically render a criminal defendant incompetent. *See, e.g.*, *State v. Lord*, 117 Wn.2d 829, 901-03, 822 P.2d 177 (1991) (trial court did not err in denying request for competency hearing, even though defendant exhibited signs of mental illness including delusions of conversations with the devil wherein the devil asked him to drink a cup of blood to prove his own innocence); *State v. Smith*, 74 Wn. App. 844, 850, 875 P.2d 1249 (1994), *review denied*, 125 Wn.2d 1017 (1995) (without evidence linking psychological disorders to the capacity to plead guilty, the trial court did not err in denying motion to withdraw guilty plea).

Bolduc also argues that the superior court interrupted Bolduc's counsel and prevented him from fully explaining his concerns about Bolduc's mental health. The record, however, shows that although the court briefly interrupted counsel to state that it was aware that Bolduc suffered from psychological problems, it immediately then allowed counsel to conclude his remarks. Counsel then asked only that the court go through the plea "a little bit slower." RP (July 12, 2011) at 3. In addition, although counsel requested the superior court make an independent finding that the plea was voluntary, at no point did Bolduc's counsel indicate to the court that he believed Bolduc should no longer be considered competent to accept the State's offered plea bargain and to enter his plea. *See generally* RP at 6 (requesting that the court accept plea as "knowing and voluntary").

The superior court and Bolduc's counsel also positively commented on Bolduc's mental state at other points in the hearing. During the sentencing portion of the hearing (the plea and sentencing occurred in the same hearing), when referring Bolduc for additional mental health services, the superior court stated that Bolduc's "[r]esponses are quite clear today." RP (July 12, 2011) at 20. Defense counsel also remarked that Bolduc appeared "stabilized" and "is complying [with medication] at this time." RP (July 12, 2011) at 18.[3]

With respect to Bolduc's "apparent confusion," Bolduc cites two instances that he argues should have alerted the court that he was not competent to proceed—"when he could not remember if he finished 11th grade and expressed confusion about his right to remain silent." Br. of Appellant at 7. Bolduc's minor confusion at two points during the plea hearing, however, does not undermine the remainder of the plea hearing record which demonstrates that Bolduc understood the nature and consequences of his plea.

For example, Bolduc's counsel stated to the court that Bolduc understood the consequences of a "strike" offense. Bolduc also stated he discussed the charges and plea with his attorney, and correctly described a "strike" offense. Bolduc additionally clarified that he understood his possible sentence, including the community custody term. In addition, prior to the hearing Bolduc reviewed and signed a written plea agreement with his attorney, in which he stated he understood he was voluntarily giving up certain rights and was making the plea "freely and voluntarily." CP at 27.

[3] Dr. Gagliardi's competency evaluation specifically stated, "[S]tability can be maintained as long as he continues to comply with psychotropic medication." CP at 83.

In sum, in light of all of the circumstances surrounding Bolduc's plea, we cannot say that the superior court erred in accepting Bolduc's *Alford/Newton* plea.

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.

QUINN-BRINTNALL, P.J.

We concur:

VAN DEREN, J.

JOHANSON, J.