

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

|                      |                            |
|----------------------|----------------------------|
| STATE OF WASHINGTON, | ) NO. 62419-9-I            |
|                      | )                          |
| Respondent,          | )                          |
|                      | )                          |
| v.                   | ) UNPUBLISHED OPINION      |
|                      | )                          |
| KERO RIINY GIIR,     | )                          |
|                      | )                          |
| Appellant.           | ) FILED: November 23, 2009 |

BECKER, J. -- Kero Giir appeals the trial court order denying his motion to withdraw his guilty plea, arguing that his counsel was ineffective in failing to investigate Giir's competency to enter the plea. We conclude that Giir has not shown counsel's representation was deficient. Giir also contends that the trial court erred in imposing mental health treatment as a condition of community custody. Because the trial court failed to make the findings required by RCW 9.94A.505(9), we reverse and remand for further proceedings.

In 2005 Giir was charged with murder in the first degree with a deadly

weapon for the May 28, 2005 stabbing death of Roda Bec and with assault in the second degree with a deadly weapon for cutting the hand of Veronica Abbas, who tried to stop Giir's attack on Bec.

Giir was born in and spent his early years in Sudan. When he was eight years old, civil war broke out. Giir suffered significant violence, abuse, and extraordinary hardship for several years in Sudan and then in a refugee camp in Kenya. Roda Bec also fled Sudan as a child and met Giir at the Kenyan refugee camp, where they spent several years before immigrating to the United States in 2001. Giir and Bec dated for several years, but their relationship deteriorated in the months preceding the assault. Bec wanted to end the relationship, and Giir objected. In February 2005, Giir went uninvited to Bec's dormitory room, where they argued and he threatened to kill her. Bec's roommate reported the incident to police, but Bec told police Giir had apologized and she declined to pursue a complaint. On May 27, 2005, Bec was visiting her friend Veronica Abbas. Giir called and asked Bec to meet him to discuss their relationship. When Bec refused, Giir threatened to kill her and one of her brothers. Abbas told Giir he could come to the apartment the next morning if he did not come alone. The next morning, Giir went to a hardware store, where he bought two knives, and then returned to his apartment, where

he wrote a letter explaining that he intended to kill Bec because she had mistreated him. Giir later told police that he wrote the letter and left it for someone to find because he intended to commit suicide after he killed Bec. Giir went to Bec's apartment. After they argued for a while, Giir pulled out a knife and stabbed Bec in the back while she was sitting on a couch, and he stabbed her multiple times as she tried to crawl away. Abbas saw the attack and tried to stop Giir, but could not do so. Abbas suffered a severe cut to her hand. She fled to a neighbor's apartment and called for help. Not long after, police received a report that a man later identified as Giir had jumped from an overpass onto a highway in an apparent suicide attempt. Giir survived the injuries he sustained.

Two experts evaluated Giir's mental state at the time of the offense, defense expert psychologist Dr. Julie Kriegler and State expert psychologist Dr. Robert Wheeler. Both psychologists noted the extensive and intensive trauma Giir suffered during childhood. Dr. Kriegler opined that Giir suffers from "extensive dissociative phenomena as well as indicators of [a] mood disorder with psychotic features," "accompanying paranoia," and "visual and auditory hallucinations of . . . 'enemies' that he responds to as a real and present danger." Dr. Kriegler further opined that Giir "also experiences cognitive

dysfunction in the form of a lost ability to think, reason, concentrate, or remember.” Dr. Kriegler concluded that based on these “chronic neuropsychiatric disturbances,” at the time of the homicide Giir was not capable of forming the necessary mental state of premeditation due to his diminished capacity.<sup>1</sup>

Dr. Wheeler diagnosed Giir with chronic Post Traumatic Stress Disorder (PTSD) and a chronic depressive disorder. The depressive disorder included symptoms of sadness, suicidal ideation, reduced energy, disturbed sleep, and feelings of hopelessness. PTSD symptoms included recurrent and intrusive recollection of events, distressing dreams, psychological distress to cues symbolizing traumatic events, and feelings of detachment and estrangement from others.<sup>2</sup> Dr. Wheeler concluded that there was no indication that at the time of the offense Giir was suffering from a mental disorder that would constitute insanity or a mental disorder or defect that impaired or diminished his capacity to intend or plan his actions, reason, or understand the consequences of his actions.

Regarding Giir’s current mental status, Dr. Wheeler reported that there was some evidence Giir’s symptoms had improved during the 18 months since

---

<sup>1</sup> Clerk’s Papers at 42.

<sup>2</sup> Clerk’s Papers at 63.

the crime. Dr. Wheeler opined that Giir showed no signs of delusions or hallucinations, and Giir did not appear to be experiencing any mental disorder that affected his capacity to rationally and coherently discuss his thinking and behavior.<sup>3</sup>

After extensive investigation and plea negotiations, in August 2007, Giir pleaded guilty to murder in the first degree and assault in the third degree, with no deadly weapon enhancements.

On November 9, 2007, Giir appeared for sentencing. The standard range for the murder conviction was 250 to 333 months. The State recommended 333 months, and defense counsel asked for an exceptional sentence of 240 months. The court imposed concurrent sentences of 300 months and 8 months. The court also imposed 24 to 48 months of community custody and as a condition ordered Giir to obtain a mental health evaluation and follow treatment recommendations.

On March 10, 2008, with the assistance of a new attorney, Giir moved to withdraw his guilty plea as not knowing, intelligent and voluntary on two grounds: his plea was based on misinformation or inconsistent information regarding the sentence the court could impose; and his guilty plea was the

---

<sup>3</sup> Clerk's Papers at 62.

product of coercion. Giir also asserted that he was unable to fully understand the proceedings due to a language barrier. Giir provided a declaration in support of his motion and testified at the hearing. His former counsel also testified.

Regarding the alleged sentencing misinformation, the court found that Giir's English language skills were adequate to understand the proceedings and noted that Giir had consistently declined the assistance of an interpreter. The court also found that trial counsel's version of his conversations with Giir about sentencing was more credible than Giir's version. Regarding Giir's claim that his plea was coerced based on his mental health and feelings of his will being overborne by counsel, the court found: Giir's self-serving affidavit failed to establish coercion, and there was no credible evidence Giir was coerced; while it was uncontroverted Giir suffered significant abuse and harm that may have led to his actions which constituted the crime, there was insufficient evidence the abuse caused his will to be overborne and render his plea involuntary; Giir's testimony that he could not defy counsel, whom he considered an "elder," was not credible; and current counsel had proffered no evidence that Giir was not competent to enter a plea due to mental health issues, rendering his argument conjecture. The court also noted that Giir did

not bring his motion to withdraw until three months after sentencing. The court denied Giir's motion to withdraw his guilty plea.

Giir appeals.

**Ineffective Assistance of Counsel**

Giir contends that the attorney who represented him on his motion to withdraw his guilty plea was ineffective in failing to investigate Giir's competency as a basis to withdraw his plea. To prevail on this claim, Giir must show (1) that defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness considering all the circumstances, and (2) that counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.2d 17 (2002); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); In re Pers. Restraint of Elmore, 162 Wn.2d 236, 252, 172 P.3d 335 (2007). Giir must show that counsel's conduct was not based on legitimate strategic or tactical reasons. Elmore, 162 Wn.2d at 252. We must begin with a strong presumption that counsel's representation was effective and must base our decision on the record below. Hutchinson, 147 Wn.2d at 206.

To be competent to stand trial, a defendant must be able to understand the nature of the proceedings and be capable of assisting in his defense. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001). The competency standard for pleading guilty is the same as for standing trial. Fleming, 142 Wn.2d at 864. Giir contends that his counsel provided inadequate assistance in failing to properly investigate Giir's competency at the time of the plea hearing. He contends that there was good reason to investigate his competency and that there was no legitimate strategic or tactical reason not to do so.

We disagree. There is no reason to think that Giir's defense counsel at the hearing on the motion to withdraw was unaware of the hospital mental status exam conducted three days after the assault, which found no psychotic or dissociative symptoms, as well as the two psychological evaluations conducted prior to the plea, which included Dr. Wheeler's report that there was evidence Giir's symptoms had improved during the 18 months since the crime and that Giir did not appear to be experiencing any mental disorder that affected his capacity to rationally and coherently discuss his thinking and behavior. Giir does not argue otherwise. See In re Pers. Restraint of Davis, 152 Wn.2d 647, 739, 101 P.3d 1 (2004) (At the very least, a defendant seeking



relief under a failure to investigate theory must show a reasonable likelihood that the investigation would have produced useful information not already known to counsel.).

Moreover, there is no evidence in the record that defense counsel did not further investigate Giir's competency. It is possible that counsel investigated and came up with no evidence useful to a claim that Giir was incompetent when he pleaded guilty. See *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 404, 972 P.2d 1250 (1999) (record does not support petitioner's current counsel's claim that trial counsel neglected issue of psychological evaluation; it is possible an evaluation was performed but provided no useful information).

In addition, counsel may have made a strategic or tactical decision not to pursue or emphasize Giir's mental competency to plead guilty. Giir argued vigorously that his trial counsel misinformed him regarding the sentence that the court could or would impose. Giir testified that he wanted to go to trial, but he agreed to plead guilty because based on trial counsel's explanation of the mandatory minimum, credit for time served, and earned early release time, Giir understood that he would be sentenced to approximately 17 years and would serve approximately 10 years, instead of the approximately 30 years he would

serve if he went to trial and lost.<sup>4</sup> Giir's testimony showed a fairly sophisticated, albeit faulty, understanding of the available sentencing options. Presenting evidence that Giir was not competent to plead guilty, i.e., that he was unable to understand the nature of the proceedings and was incapable of assisting in his defense, would have severely undercut Giir's claim that trial counsel misinformed him regarding sentencing.

Because we have determined that Giir has not shown counsel's representation was deficient, we need not consider whether the alleged deficient representation prejudiced Giir. Hutchinson, 147 Wn.2d at 208.

### **Community Custody Condition**

Giir contends that the trial court erred in ordering as a condition of community custody that Giir obtain a mental health evaluation and follow treatment recommendations. He contends that the condition must be stricken because the trial court failed to make the findings required by RCW 9.94A.505(9), that reasonable grounds exist to believe Giir is a mentally ill person and that his mental health condition likely influenced his offense.

In response, the State filed a motion to dismiss Giir's notice of appeal of the judgment and sentence as untimely. Giir pleaded guilty in August 2007 and

---

<sup>4</sup> Report of Proceedings (June 26, 2008) at 53, 60-64.

was sentenced on November 9, 2007. Giir was provided a written notice of his rights on appeal and that he must file an appeal within 30 days. The judgment and sentence was entered on November 15, 2007. Giir did not file a notice of appeal. On March 10, 2008, Giir filed his motion to withdraw his guilty plea. The trial court denied the motion on September 19, 2009. On September 30, 2008, Giir filed a notice of appeal, challenging the order denying his motion to withdraw and the earlier judgment and sentence.

The State contends that Giir's challenge to the condition of sentence is not within the scope of appeal of the order denying the motion to withdraw. We agree. See State v. Gaut, 111 Wn. App. 875, 881, 46 P.3d 832 (2002) (scope of review of order denying motion to withdraw plea is limited to the trial court's exercise of its discretion in deciding the issues raised in the motion).

The State also contends that Giir's notice of appeal was untimely as to the judgment and sentence and that accordingly the assignment of error to the community custody condition must be stricken. Giir responds that the State has not shown Giir made a knowing, intelligent, and voluntary waiver of his right to appeal because the court did not orally advise Giir of his appeal rights, the notice of rights form improperly states only the limited right to appeal a sentence higher than the standard range, and two key paragraphs on the

notice are inexplicably stricken.

In a criminal case, there can be no presumption in favor of the waiver of a right to appeal, and the State bears the burden of demonstrating that a defendant made a knowing, intelligent, and voluntary waiver of the right to appeal. State v. Tomal, 133 Wn.2d 985, 989, 948 P.2d 833 (1997); State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). A criminal appeal may not be dismissed as untimely unless the State meets this burden. See State v. Devin, 158 Wn.2d 157, 166, 142 P.3d 599 (2006); State v. Kells, 134 Wn.2d 309, 313, 949 P.2d 818 (1998).

We do not know the source of the small mark on the notice form, but nothing in the record indicates that defense counsel, the State, or the court intended to strike or did strike any rights listed on the notice of rights form or that Giir would have filed an appeal but for the unexplained mark on the form. See Devin, 158 Wn.2d at 166 n.4 (In the absence of an affidavit or declaration establishing that defendant told his counsel to file an appeal and counsel ignored it, the court cannot conclude defendant did not waive right to appeal.).

Relying on Devin, the State contends that the notice of rights form contained all the rights required by CrR 7.2(b), Giir signed the notice in open court, and he therefore was warned that he would irrevocably waive his right to

appeal if he failed to file a notice of appeal within 30 days. In Devin, the defendant was warned that he would irrevocably waive his right to appeal if he failed to pursue it within 30 days, he did not timely file a notice of appeal, and he presented no evidence to the contrary. Devin, 158 Wn.2d at 166. Giir received a similar written warning.

But the State has not responded to Giir's argument that the court did not orally advise Giir of his appeal rights or that the notice of rights form improperly stated only the limited right to appeal a sentence higher than the standard range, i.e., that it did not inform Giir he had the right to appeal conditions of community custody. This situation is more like Kells, where the issue was whether the defendant could voluntarily waive a right he was not told he had. Kells, 134 Wn.2d at 820-21; accord Devin, 158 Wn.2d at 166-67. The State has not demonstrated that Giir knowingly, intelligently, and voluntarily waived his right to appeal. We deny the State's motion to strike Giir's assignment of error challenging the conditions of community custody. See State v. Jones, 118 Wn. App. 199, 203, 76 P.3d 258 (2003) (Supreme Court reversed dismissal of untimely appeal).

A trial court may order mental health treatment as a condition of community custody only if it finds that reasonable grounds exist to believe the

defendant is a mentally ill person as defined in RCW 71.24.025 and that this condition is likely to have influenced the offense. RCW 9.94A.505(9); State v. Jones, 118 Wn. App. at 209. The order must be based on a presentence report and, if applicable, mental status evaluations. Jones, 118 Wn. App. at 209. The issue can be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (An illegal or erroneous sentence may be challenged for the first time on appeal.); Jones, 118 Wn. App. at 204. Giir relied on his mental health problems at sentencing, the issue apparently was addressed in

his presentence report, and both evaluators addressed it in their reports. But the trial court did not make the findings. Accordingly, we remand for the trial court to strike the conditions or make the findings required by RCW 9.94A.505(9). Jones, 118 Wn. App. at 212.

We affirm the denial of Giir's motion to withdraw his guilty plea. We reverse the conditions of community custody and remand for further proceedings.

Becker, J.

WE CONCUR:

Jain, J.

Edmonton, J.