IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 64536-6-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
LEEMAH CARNEH,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: November 7, 2011
	)	

Lau, J. — If the trial court has reason to doubt a defendant's competence, it must follow the competency hearing procedures as set forth in chapter 10.77 RCW. Once competency is determined, however, the trial court is not required to reconsider competency unless presented with new evidence that his condition has changed. Here, the court did not err in declining to reconsider Carneh's competency because he presented no new evidence that his condition changed. And because the decision whether to call particular witnesses or present certain evidence is a matter of legitimate trial tactics, Carneh demonstrates no deficient performance. We affirm his convictions.

FACTS

The basic facts are undisputed. On March 15, 2001, the State charged Leemah Carneh with four counts of first degree aggravated murder. For the next eight and one-half years, the same defense attorneys represented Carneh.[1]

Carneh is a paranoid schizophrenic and suffers from delusions. Pending trial, Carneh was repeatedly sent to Western State Hospital (WSH) for competency evaluation. Carneh's attorneys retained psychiatrist George Woods and psychologist Dale Watson. All the experts generally agreed Carneh was able to understand the proceedings against him. Any contested issue involved whether he could rationally assist his attorneys.

In September 2001, the trial court found Carneh incompetent and committed him to WSH for competency restoration. In February 2002, the court found Carneh competent. By May 2002, he was recommitted. After 90 days' commitment, the court entered an agreed order finding him competent in September 2002. While in King County jail, Carneh discontinued his medication and his condition deteriorated.

In May 2004, WSH doctors determined Carneh incompetent to stand trial. After two 90-day commitments to WSH and one 6-month commitment, the parties contested Carneh's competency to stand trial. In October 2005, the court dismissed the criminal charges, finding Carneh incompetent because he was incapable of rationally assisting his attorneys in presenting his defense. The court determined that Carneh's

[1] A third attorney was added in September 2008.

competency could be restored in the future if he continued his medication. He was civilly committed to WSH.

In November 2007, the State refiled murder charges and transferred him from WSH to King County jail. In October 2008, the court held an eight-day contested competency hearing. State experts WSH psychologist Ray Hendrickson and WSH psychiatrist Glenn Morrison testified. Drs. Woods and Watson also testified. The court found Carneh incompetent and committed him for further competency restoration. The court's order noted that Dr. Woods agreed that "there is medically appropriate treatment available to the doctors at WSH that is reasonably likely to restore the defendant's competency and there is a substantial probability that the defendant will regain competency within a reasonable period of time."

In July 2009, the court held a six-day contested competency hearing that is the subject of this appeal. Once again, Drs. Hendrickson, Morrison, Watson, and Woods testified.

Dr. Hendrickson concluded:

> [Carneh] hasn't abandoned delusions and in fact he articulates delusions which I think we all agree are not normal beliefs about some things like the hypnosis, empathy words and so forth but they don't impact his ability to have a rational understanding of the procedures and to be able to communicate with a rational understanding with his attorneys.

Report of Proceedings (RP) (July 7, 2009) at 82.

Dr. Morrison observed that Carneh was able to stay on topic during a lengthy interview, could put delusional material aside, and could remain engaged in a reality-oriented conversation for a significant period. Whenever Carneh discussed delusional

materials, he could be redirected. Drs. Hendrickson and Morrison agreed Carneh was competent.

Dr. Woods testified that Carneh's continued delusions impaired his ability to rationally assist his attorneys. He explained that Carneh's impaired thinking directly affected his ability to rationally assist his attorneys and his thinking about whether to plead insanity. He concluded Carneh incompetent to stand trial.

Although Dr. Watson noted some improvement "approaching competence," he also concluded Carneh incompetent to stand trial. RP (July 16, 2009) at 41. During the hearing, Carneh's attorney submitted a brief declaration describing several delusional interactions between Carneh and his attorneys.

After the hearing, the court found Carneh competent to stand trial. The court entered extensive written findings of fact and conclusions of law, which also incorporated its oral ruling. Carneh challenges finding of fact 5 and related conclusions of law 1 and 3.[2]

The court ordered Carneh transported from the King County jail to WSH for

[2] "5. Despite the remaining symptoms of Mr. Carneh's mental illness, he has demonstrated that he has the ability to rationally assist his counsel in his defense. He has demonstrated that he has a rational understanding of the evidence in this case and can suggest rational ways to confront that evidence. Mr. Carneh has demonstrated that he can understand the state's theory of the case and rationally discuss trial strategies with his counsel. Mr. Carneh has demonstrated that he can accurately and factually relate information to his counsel about the crimes with which he is charged and that he can rationally understand likely outcomes based upon that information and possible plea options based upon that information."

Carneh makes no direct challenge to the court's competency finding. The only argument he makes in his brief is an ineffective assistance of counsel claim. We conclude substantial evidence supports finding of fact 5.

medical reviews once every two weeks to maintain his competency to stand trial. On August 28, 2009, Carneh waived his right to a jury trial. At the omnibus hearing in October 2009, he told his attorneys that he wanted to plead guilty as charged. At the plea hearing on November 17, 2009, the State submitted a declaration from WSH psychiatrist William Richie, who concluded that Carneh's mental condition since the competency ruling remained unchanged.

Carneh's attorneys also submitted declarations to the court stating continued disagreement with the court's prior competency decision, Carneh's plea was not competently made, and no significant change in condition since the competency ruling.

The court indicated it reviewed and considered the three attorney declarations. The prosecutor conducted a lengthy plea colloquy with Carneh. His attorneys told the court Carneh was not competent and his mental condition remained unchanged since the competency ruling. The court accepted Carneh's plea, found him competent to enter the plea, and entered findings of fact and conclusions of law. The court then imposed life sentences on the four counts of aggravated murder in the first degree. Carneh appeals.

ANALYSIS

Guilty Plea[3]

[3] On appeal Carneh assigns error to findings of fact 2, 3, and 4 and related conclusions of law 1 and 2.

"2. While counsel for Mr. Carneh continue to disagree with this court's competency finding, they represent that there are no new reasons that would call into question the defendants competency to stand trial beyond what this court already heard and considered in making its competency finding.

Carneh contends the trial court abused its discretion by accepting his guilty plea without considering or giving considerable weight to his attorneys' declaration opinion testimony that he was incompetent. Carneh also claims these declarations triggered the court's obligation to reconsider its July 2009 competency ruling and the failure to do so constitutes error. The State responds that the record shows the court reviewed these declarations, which revealed his attorneys' candid acknowledgement—no change occurred in Carneh's mental status since the court's 2009 competency ruling.[4]

Our review of the record shows the court reviewed the three attorneys' guilty plea declarations that discussed Carneh's then mental status.

> In recent conversations with Mr. Carneh he has expressed the desire to plead guilty. Given the court's [competency to stand trial ruling], and my obligations as defense counsel, I am required to assist my client in entering a

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"3. This court ordered that Mr. Carneh submit to periodic medical reviews at WSH for the purpose of maintaining his competency to stand trial. Dr. William Richie at WSH conducted those reviews. These periodic medical reviews have had their intended effect. Mr. Carneh has remained appropriately medicated. His medical, psychological and behavior status has been maintained or improved since this court found him competent to stand trial. These medical reviews have not raised any new question regarding, the defendant's competency to stand trial and confirm the court's finding that Mr. Carneh is competent to stand trial.

"4. During the plea colloquy, Mr. Carneh demonstrated that he understood the essential elements of the charges against him, and he admitted to sufficient facts to support his pleas. During the plea colloquy, Mr. Carneh also demonstrated that he understood the rights that he waived by pleading guilty. Mr. Carneh demonstrated that he has a rational and factual understanding of the consequences of his plea, including but not limited to, the fact that he will be sentenced to life in prison without the possibility of release, that nothing will intervene to change this sentence, and that as a result he will die in prison." Substantial evidence supports these findings.

[4] The State argues the invited error doctrine bars this argument because defense counsel represented that no new facts suggested incompetence. Invited error prohibits a party from setting up error in trial court and then complaining about error on appeal. State v. Armstrong, 69 Wn. App. 430, 848 P.2d 1322 (1993). Because we find no error, we need not address whether any error was invited.

> plea of guilty should he decide to enter that plea. However, I cannot represent to the court that I believe my client is making a knowing, intelligent, and voluntary decision.
>
> I do not believe that Mr. Carneh's condition has changed in any significant degree since the competency hearing.

Affidavit of counsel Louis Frantz.

> 3. . . . Given the court's ruling on competency, and my obligations as defense counsel, I am required to assist Mr. Carneh in entering a plea of guilty should he decide to enter that plea. However, I cannot represent to the court that I believe Mr. Carneh is making a knowing, intelligent and voluntary decision.
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> 4. I do not believe that Mr. Carneh's condition has changed to any significant degree since the court found him competent. . . .
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> . . . .
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> 9. The delusions, auditory hallucinations and other psychotic symptoms described here were, for the most part, all present at the time of the most recent contested competency hearing. While Mr. Carneh has endorsed some new delusional material, it appears to be a variation on past themes and appears to impair his reasoning and influence his decision making to approximately the same degree as it did when the court found him competent. It does not appear to me that Mr. Carneh's mental condition as it relates to competence to stand trial or plead guilty has changed to an appreciable degree since that hearing. In my opinion he was incompetent then and he remains so today.

Declaration of counsel Carl Luer.

> 2. . . . . I disagree with the court's ruling on competence and continue to believe that Mr. Carneh is not competent.
>
> 3. . . . . I also cannot represent to this court (at the time of preparing this declaration) that I believe Mr. Carneh is making a knowing, intelligent, and voluntary decision to plead guilty.

Declaration of counsel Edwin Aralica.

The court's written findings of fact and conclusions of law indicate, "[T]he Court has considered all of the records and files herein, including but not limited to the November 9, 2009 Declarations of counsel for the defendant." As to these declarations, the findings of fact state, "While counsel for Mr. Carneh continue to

disagree with the court's competency finding, they represent that there are no new reasons that would call into question the defendant's competency to stand trial beyond what this court already heard and considered in making its competency finding."

Consistent with their declarations, his attorneys also told the court at the plea hearing that Carneh's mental condition had not changed and "we are not requesting a new evaluation." 7 RP (Nov. 17, 2009) at 86.

The record also shows that the trial court reviewed WSH psychiatrist William Richie's declaration submitted by the State. That declaration represented Carneh's psychological functioning as unchanged or improved and concluded Carneh had not "manifested any medical or psychological functional decline which would cause me to call into question the court's competency determination."

The court's findings of fact and conclusions of law also indicate that it considered the November 16, 2009 declaration of Dr. William Richie. The court's related finding of fact states:

> 3. This court ordered that Mr. Carneh submit to periodic medical reviews at WSH for the purpose of maintaining his competency to stand trial. Dr. William Richie at WSH conducted those reviews. These periodic medical reviews have had their intended effect [to maintain or improve competency to stand trial]. Mr. Carneh has remained appropriately medicated. His medical, psychological and behavior status has been maintained or improved since this court found him competent to stand trial. These medical reviews have not raised any new question regarding, the defendant's competency to stand trial and confirm the court's finding that Mr. Carneh is competent to stand trial.

After the State's plea colloquy and defense attorneys' representations quoted above, the court stated:

> As I indicated earlier I had read the declarations of Mssrs. Aralicia, Luer and Frantz and considered them this morning while clearly I accepted their

> representations and opinions are made in good faith. They are candid in acknowledging that this is the opinions that they had in July and that there is not anything material and different now. I have reviewed the statement of defendant on plea of guilty. I have been paying close attention to the court proceedings we have had not only in the contested competency hearings but since, and particularly close attention to Mr. Carneh and his presentation.

RP (Nov. 17, 2009) at 87-88. The court then briefly questioned Carneh, found him competent to enter a plea of guilty, and found his plea knowing, intelligent, and voluntary.

"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, 402, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993). A trial court's decision on competency is reviewed 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). "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).

We give considerable deference to the trial court's competency determination "because of its personal observation of the defendant's behavior and demeanor that is claimed to have demonstrated incompetency." State v. Hicks, 41 Wn. App. 303, 309, 704 P.2d 1206 (1985). The court should give considerable weight to the attorney's opinion regarding a client's competency. State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991). But a court need not grant a motion to determine competency merely because it has been filed; the motion must be supported by a factual basis. Lord, 117 Wn.2d at 901. Once the trial court makes an initial determination, it need not revisit the issue unless "'new information presented has altered the status quo ante.'" State v. Ortiz, 119 Wn.2d 294, 301, 831 P.2d 1060 (1992) (quoting clerk's papers). The trial court's decision whether to hold another competency hearing is reviewed for an abuse of discretion. State v. Heddrick, 166 Wn.2d 898, 903, 215 P.3d 201 (2009).

We conclude that nothing in this record supports Carneh's assertion that the trial court neglected to consider or give due weight to his attorneys' declarations. As discussed above, the court considered his attorneys' declarations and oral representations but correctly found no new evidence calling into question its July 2009 competency ruling.

Carneh relies on State v. Sanders, 209 W. Va. 367, 549 S.E.2d 40 (2001), arguing that like Sanders, "[t]he [trial] court's statement that nothing 'new was offered [in defense attorneys' declarations] reveals the court's failure to recognize, let alone consider, the evidentiary value." Appellant's Br. at 41.

But as the State correctly argues, the principal question, not addressed in

Carneh's brief, is whether Carneh presented new material evidence since the competency ruling to warrant the trial court's reevaluation of his competency.[5] Ortiz, 119 Wn.2d at 301. In discussing the trial court's obligation to hold a new competency hearing, like in Ortiz, Sanders reasoned:

> "[W]hen a competency hearing has already been held and defendant has been found competent to stand trial . . . a trial court need not suspend proceedings to conduct a second competency hearing unless it is presented with a substantial change of circumstances or with new evidence casting a serious doubt on the validity of that finding."

Sanders, 549 S.E.2d at 51 (quoting People v. Kelly, 1 Cal. 4th 495, 3 Cal. Rptr.2d 677, 822 P.2d 385, 412 (1992)).

In Sanders, despite an expert's warning about the possibility of degeneration if a long delay occurred before trial, five months passed between the competency hearing and trial. Then, a month before trial, an expert's report raised doubt about defendant's competency. The court held that given the new report and defendant's bizarre behavior at trial, the trial court erred by failing to re-evaluate competency at the time of trial. But here, it is undisputed that no change occurred in Carneh's mental condition since the July 2009 competency hearing.

While Carneh's brief neglected to address whether the attorney declarations presented new evidence sufficient to warrant competency reconsideration, at oral argument to this court, Carneh argued that the attorney declarations revealed new delusional material that the trial court disregarded. For example, an attorney's declaration explained that Carneh believed:

[5] Carneh filed no reply brief.

> [W]hen 'Tranquility' occurs he will be tranquilized and a remote control will be implanted in his body. This will result in him regaining the vision subtitle skill, his natural white color and straight hair, among other lost attributes. . . . [T]he 'Tranquility' will result in his release [from prison] in March, 2010.

Expert testimony at the competency hearing discussed some of these concepts, including the "vision subtitle skill" and his perceived unnatural hair and skin color. See, e.g., RP (July 7, 2009) at 137, RP (July 8, 2009) at 20.

But even assuming Carneh experienced new delusions since the competency hearing, all the experts discussed extensively his delusions at the competency hearing and in their reports. Importantly, the central issue addressed by all four experts who testified in the competency hearing was how Carneh's delusions affected his ability to rationally assist in his defense. Although the specific delusions may have shifted slightly by the time of the plea hearing, no evidence presented at the plea hearing demonstrated that his mental condition had changed. In addressing Carneh's delusions, his attorney candidly acknowledged, "While Mr. Carneh has endorsed some new delusional material, it appears to be a variation on past themes and appears to impair his reasoning and influence his decision making to approximately the same degree as it did when the court found him competent." All information and opinions on Carneh's mental status offered at the time of the plea, including opinions from Dr. Richie[6] and Carneh's attorneys, either concluded that his condition was essentially unchanged or had improved. Because the trial court did not abuse its discretion in finding Carneh competent to enter a plea of guilty, we affirm his convictions.

[6] Dr. Richie, supervising psychiatrist at the Center for Forensic Services at WSH, conducted Carneh's medical reviews after the competency finding.

Ineffective Assistance

Carneh argues that his attorneys provided ineffective assistance of counsel because they offered no personal opinions about his competency at the 2009 competency hearing. The State counters that defense attorneys' decision to rely on expert testimony instead of counsels' personal opinion testimony was tactical. The State also argues Carneh demonstrates no prejudice because the attorneys' opinions offer nothing different from his experts' testimony.

To prevail on a claim of ineffective assistance, a defendant must show both deficient performance and resulting prejudice. Strickland v. Wash., 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness based on a consideration of all the circumstances. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Our scrutiny of defense counsel's performance is highly deferential and it employs a strong presumption of reasonableness. Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d 322, 335–36, 899 P.2d 1251 (1995). To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial or ruling would have been different absent counsel's deficient performance. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Failure on either prong of the test defeats a claim of ineffective assistance of counsel. Strickland, 466 U.S. at 697.

> Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or

most common custom.

Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011) (quoting Strickland, 466 U.S. at 689-90) (citations omitted).

Claimed deficient performance cannot be based on matters of legitimate trial strategy or tactics. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). The decision whether to call a particular witness or present certain evidence is a matter for differences of opinion and therefore presumed to be a matter of legitimate trial tactics. In re Pers. Restraint of Davis, 152 Wn.2d 647, 742, 101 P.3d 1 (2004).

Carneh cites to no case holding deficient representation by defense counsel for not offering a personal opinion as evidence in a contested competency hearing. Instead, he cites Hull v. Kyler, 190 F.3d 88, 112 (3d Cir. 1999), which held defense counsel's performance deficient and prejudicial for failing to contest competency despite obvious facts indicating incompetency. Unlike here, the attorney failed to cross-examine the State's witness or present any evidence of his client's incompetence. In a previous opinion in Hull's case, the court faulted defense counsel's reliance on his own competency opinion: "[F]ew lawyers possess even a rudimentary understanding of psychiatry. They therefore are wholly unqualified to judge the competency of their clients." Hull v. Freeman, 932 F.2d 159, 168 (3d Cir. 1991). Defense counsel was deficient not for failing to testify, but for failing to contest competency. Hull is inapplicable.

Carneh also cites two law review articles that suggest defense counsel should testify in competency proceedings. Grant H. Morris, Ansar M. Haroun, & David

Naimark, Competency to Stand Trial on Trial, 4 Hous. J. Health L. & Pol'y 193 (2004); James A. Cohen, The Attorney-Client Privilege, Ethical Rules, and the Impaired Criminal Defendant, 52 U. Miami L. Rev. 529 (1998). The authors discuss policy reasons favoring the practice. But they also note the potential legal and ethical risks and acknowledge that defense counsel "typically does not testify in the incompetency hearing"), e.g., Morris, supra, at 199.

Carneh also relies on the American Bar Association's criminal justice mental health standard. But the standard provides no support for the proposition that an attorney acts deficiently by not offering testimony at a competency hearing. Rather, the standard suggests, "Defense counsel may elect to relate to the court personal observations of and conversations with the defendant to the extent that counsel does not disclose confidential communications or violate the attorney-client privilege; counsel so electing may be cross-examined to that extent." Am. Bar Ass'n, Criminal Justice Mental Health Standard 7-4.8(b)(i), http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_blk.html (emphasis added). This standard neither imposes a duty to testify nor resolves the ineffective assistance claim here.

Carneh also relies on a footnote in Drope v. Missouri, 420 U.S. 162, 177, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975) in which the Supreme Court observed that the trial court should consider counsel's opinion when evaluating competency.[7] The Court

[7] This unremarkable observation conforms to the identical Washington rule

qualified that observation: "Although we do not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client, an expressed doubt in that regard by one with 'the closest contact with the defendant,' is unquestionably a factor which should be considered." Drope, 420 U.S. at 177 n.13 (quoting Pate v. Robinson, 383 U.S. 375, 391, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966)).

In addition, Drope discusses neither whether counsel should testify in competency hearings nor whether counsel is ineffective for failing to do so. Although failure to raise a concern about competency with the court may constitute ineffective assistance, see Fleming, 142 Wn.2d at 863-67, Carneh cites no case in Washington or any jurisdiction that holds defense counsel is ineffective for failing to testify in a competency hearing.

Carneh also fails to address the difficult ethical considerations involved in deciding to testify about a client's competency. Two Washington State Bar opinions, No. 2190 (2009) and No. 2099 (2005) conclude that RPC 1.6[8] prohibits disclosure of attorney-client communications without client consent. For example, Opinion No. 2190 § 3.2.2 states, "Because a lawyer could simply inform the court of the existence of a competency issue, the lawyer should not disclose any communications that would be

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discussed above.

[8] RPC 1.6 provides in part:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

protected by the attorney-client privilege, and should not disclose any other secrets, including non-verbal gestures and observations." See also United States v. Battle, 264 F. Supp. 2d 1088, 1174-75 (N.D.Ga. 2003).[9]

State v. Webbe, 122 Wn. App. 683, 94 P.3d 994 (2004), illustrates the entwined legal and ethical challenges an attorney faces by testifying in a client's competency hearing. In Webbe, one of Webbe's attorneys attempted to testify in the competency proceedings. Webbe, 122 Wn. App. at 687. Assuming the attorney had his client's consent for disclosure, the trial court ordered the attorney to turn over his client interview notes to the State following in camera review. After turning the notes over to the State, the defense attorneys then questioned whether Webbe had waived his attorney-client privilege. Webbe, 122 Wn. App. at 689. The court appointed another

[9] In rejecting defendant's ineffective assistance claim, the court in Battle reasoned:

"Counsel have a duty to their client and to the Court to notify the Court when they believe their client lacks competency to proceed in a criminal case. In this case defense counsel promptly did so. However, Defendant's argument that his counsel should have testified to his claimed incompetency at best is impractical and at worst would be unethical. If counsel were allowed to testify, they would be subject to cross-examination as to the matters covered by the direct examination. Undoubtedly this would raise the issue of waiver of attorney-client privilege. Furthermore, counsel's testimony would not pertain to an uncontested matter. In this case, competency is a contested matter. Counsel can and should advise the Court when there are difficulties in communicating with a client; however, this cannot be done through sworn testimony of counsel. In this case counsel had conferences both with the magistrate judge and with the undersigned District Judge on the very topic of difficulty in communicating with Defendant.

Counsel did call expert witnesses at the competency hearing who opined that Defendant's claimed delusion with respect to his implants was an impediment to assisting his counsel in defending the case. Thus, the Court was fully advised of the defense's contention that Defendant was not able to assist counsel." Battle, 264 F. Supp. 2d at 1175.

attorney to represent Webbe on this limited issue. He later notified the court that Webbe determined to not waive his privilege. Webbe, 122 Wn. App. at 689-90. Consequently, the attorney declined to testify and Webbe was found competent. Webbe, 122 Wn. App. at 690. We noted that defense counsel's disclosure of privileged notes without the client's consent was "unsettling" and "grievous error," but held that no prejudice resulted sufficient to demonstrate ineffective assistance of counsel.[10] Webbe, 122 Wn. App. at 694-99. The record here is silent on whether defense attorneys sought Carneh's consent to waive his attorney-client privilege. And Carneh makes no argument that his attorneys should have sought his permission to disclose confidential communications.

Because Carneh cites no controlling authority for his deficient performance claim and because the decision whether to present certain evidence is a legitimate trial tactic, we conclude Carneh demonstrates no deficient performance by his attorneys.

Even if we assumed deficient performance, Carneh demonstrates no prejudice. Carneh identifies no information his attorneys would have offered that was substantially different from the testimony of his experts. Drs. Woods and Watson, who examined Carneh since 2001, testified at length about his mental illness and the impact on his ability to rationally assist his attorneys. Carneh demonstrates no reasonable probability the trial court would have found him incompetent based on his attorney declarations. We conclude Carneh's ineffective assistance of counsel claim fails. We

[10] The Associated Counsel for the Accused, which represented Webbe, also represented Carneh in the 2009 competency hearing.

affirm his convictions.

WE CONCUR: