No. 30003-0-III

Brown, J. (dissenting) • In 2009, after an initial Eastern State Hospital admission and report of incompetency, the court, without contest, adopted the Eastern State Hospital recommendations and stayed proceedings before ordering an additional 90-day commitment in Blayne Coley's case to permit possible restoration of his competency. Later in 2009, after Mr. Coley disputed an Eastern State Hospital staff report that he was then competent, the court asked counsel to research what kind of competency hearing was required. Mr. Coley quoted volume 12, section 907 of *Washington Practice* while arguing:

> MR. PERRY: [I]f the report of the court appointed experts is contested the court must hold a hearing.
> . . . .
> Mr. PERRY: "[T]he accused has the burden of showing he or she is incompetent to stand trial by a preponderance. This proof requirement is based on the presumption of sanity. At the hearing "the next paragraph," the experts or professional persons who joined in the report may be called as witnesses. The prosecution and defendant may both summon any other qualified expert or professional to testify." And there they cite 10.77.010. "The rules of evidence are applicable at the hearing."

Report of Proceedings (RP) (Nov. 9, 2009) at 3.

At the June 2010 competency hearing, Mr. Coley's attorney, John Perry asserted the State had the burden to prove competence. The State pointed to volume 12, section 907 of *Washington Practice*. The court said:

> I see the second to the last paragraph of Section 907 states that "An accused has the burden of showing that he or she is incompetent to stand trial." Is that the section?

RP (June 11, 2010) at 9. The State confirmed it was. Mr. Perry then withdrew his argument that the burden was on the State. Considering Mr. Coley's concession, I do not believe it is now proper for Mr. Coley to change his position here.

Moreover, at the competency hearing, the court considered extensive evidence, including testimony from opposing experts when considering the contest to the Eastern State Hospital experts' report. Dr. E. Clay Jorgensen, a defense clinical psychologist, opined Mr. Coley understood the nature of the proceedings against him, but could not assist his attorney in his defense. Eastern State Hospital psychiatrist, Dr. William Grant, opined Mr. Coley understood the nature of the proceedings against him and was capable of assisting in his defense, but that he might not be willing to assist. Mr. Coley testified he was competent and understood the nature of the proceedings. Mr. Coley testified he could provide his attorney with information and would cooperate with the attorney and the attorney's decisions regarding his case. The court allowed Mr. Coley to his

advantage to argue first in contesting the Eastern State Hospital report, "since the defendant has the burden of proof." RP (June 11, 2010) at 137. The court, considering all, found Mr. Coley competent to stand trial.

RCW 10.77.084(1)(a) allows for a stay of proceedings, as here, when an incompetency report under RCW 10.77.060 is returned by the court appointed experts. After a defined mental health treatment and restoration period has elapsed, the court at a hearing considers again the appointed experts' report. Here, the experts reported Mr. Coley's competency had been restored and the stay was lifted. RCW 10.77.084(1)(c) details this process, and, as explained above the contested hearing concluded with a finding that the Eastern State Hospital report correctly determined Mr. Coley's competency had been successfully restored. The issues at the restoration hearing are, in my view, exactly the same for the parties initially, whether the report correctly assessed Mr. Coley's competency. In the end, Mr. Coley asserted he was incompetent while the State defended the Eastern State Hospital report of competency. I do not understand this record to show the trial court incorrectly allocated the burden of proof to Mr. Coley. The process is the one traditionally followed in the trial courts and was rendered under standard instructions.

I do not agree with Mr. Coley that any due process or structural error occurred. Chapter 10.77 RCW provides the process a court must follow in making competency

determinations. Failure to comply with these procedures violates due process. *State v. Heddrick*, 166 Wn.2d 898, 903-04, 215 P.3d 201 (2009). But no due process violation is shown in this record.

Mr. Coley's argument relies entirely on his assertion "the State bears the burden of proving competency" under chapter 10.77 RCW. Br. of Appellant at 5-6 (citing *State v. Wicklund*, 96 Wn.2d 798, 805, 638 P.2d 1241 (1982); *Born v. Thompson*, 154 Wn.2d 749, 753-54, 117 P.3d 1098 (2005); *State v. Hurst*, 158 Wn. App. 803, 811, 244 P.3d 954 (2010), *aff'd*, 173 Wn.2d 597, 269 P.3d 1023 (2012)). His assertion is incorrect. In *Wicklund*, our state Supreme Court noted the trial court had placed the burden of proving Mr. Wicklund's competency on the State; it did not rule that the statute required the burden be borne by the State. *Wicklund*, 96 Wn.2d at 805. In *Born* and *Hurst*, the issue was whether the State had met the burden of proving the defendant should be committed to determine competency, not whether the defendant should be tried. *Born*, 154 Wn.2d at 753-54; *Hurst*, 158 Wn. App. at 811. Moreover, *Born* and *Hurst* dealt with the standard of proof, not the burden of proof. *Born*, 154 Wn.2d at 753-54; *Hurst*, 158 Wn. App. at 811.

While chapter 10.77 RCW does not specify which party should bear the burden, the often cited Washington Practice treatise, relied upon by the trial court, indicates that defendants bear the burden of proving incompetence. *See* Royce A. Ferguson, Jr.,

Washington Practice: Criminal Practice and Procedure § 907, at 178 (3d ed. 2004) ("An accused has the burden of showing that he or she is incompetent to stand trial by a preponderance of the evidence. This proof requirement is based upon the presumption of sanity."). Ferguson cited United States Supreme Court cases *Medina v. California*, 505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992), and *Cooper v. Oklahoma*, 517 U.S. 348, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996). Both cases held a court could constitutionally place the burden of proof on the defendant. *Medina*, 505 U.S. at 449; *Cooper*, 517 U.S. at 369.

And, our state Supreme Court has reasoned:

> It is well settled that the law will presume sanity rather than insanity, competency rather than incompetency; it will presume that every man is sane and fully competent until satisfactory proof to the contrary is presented.

Grannum v. Berard, 70 Wn.2d 304, 307, 422 P.2d 812 (1967) (citing 29 Am. Jur. *Insane and Other Incompetent Persons* 132, p. 253.) Even so, our state Supreme Court has yet to rule upon which party bears the burden of proving competence or incompetence. *See State v. Benn*, 120 Wn.2d 631, 661, 845 P.2d 289 (1993).

"The trial court has wide discretion in judging the mental competency of a defendant to stand trial." *State v. Ortiz*, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985). A trial court's decision will not be reversed absent abuse of discretion. *Benn*, 120 Wn.2d at 662. Additionally, it is the sole province of the fact finder, here the trial court, to weigh

evidence. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999) (citing *State v. Snider*, 70 Wn.2d 326, 327, 422 P.2d 816 (1967)). The court conducted a lengthy competency hearing, and both parties presented evidence to support their arguments. As the State argues, any error is therefore merely theoretical. *State v. Kirkman*, 159 Wn.2d 918, 934-35, 155 P.3d 125 (2007). The court followed the procedural requirements of RCW 10.77.086(2) and found the State's evidence, together with its observation of Mr. Coley, persuasive. The record supports the trial court's reasoning that Mr. Coley had the ability to understand the proceedings and assist in his defense.

Considering all, I would hold the trial court did not err in its competency determination process. Additionally, I would reach and reject Mr. Coley's self-representation contentions. Thus, I would affirm. Therefore, I respectfully dissent.

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Brown, J.