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STATE v. WHITE: Does Critical Mean Contested?**Mike Wilson**

No. DA 13-0589

Montana Supreme Court

Oral Argument: Wednesday, October 29, 2014 at 10:45a.m., in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building in Helena, Montana.

I. INTRODUCTION

Mark White, Appellant, and the State of Montana, Appellee, argue whether White received the due process rights afforded to him under the Montana Constitution. White claims that (1) his absence during a critical stage of his trial caused him prejudice; and (2) the State's failure to afford him an initial appearance constituted plain error and violated his Constitutional rights. The State argues that this is not an appropriate case for the Court to invoke discretionary power of plain error review because White had no right to be present during the proceeding in question, and White invited or acquiesced to any error that may have occurred by his absence from the initial appearance.

II. FACTUAL AND PROCEDURAL BACKGROUND¹

On February 25, 2011, the State of Montana charged Mark Nicholas White with assault with a weapon following an incident where White allegedly injured a newspaper delivery worker with a knife. White has a history of mental illness. Following a medical examination completed shortly after his arrest, White was admitted to the Hope House for psychiatric treatment and evaluation. During this time, White was "overtly psychotic and expressed delusional thoughts . . . was very angry, and physically threatened and was hypersexual to staff members." The combination of the danger White posed to others and his refusal of recommended treatment prompted the State to initiate involuntary commitment proceedings.

¹ The facts come from the following documents: (i) Appellant's Br., *State v. White* (Mont. April 14, 2014) (No. DA 13-0589), available at <http://perma.cc/U3YY-EBSC>; (ii) Appellee's Br., *State v. White* (Mont. July 14, 2014) (No. DA 13-0589), available at <http://perma.cc/DGL8-QP38>; (iii) Appellant's Reply Br., *State v. White* (Mont. July 24, 2014) (No. DA 13-0589), available at <http://perma.cc/68H-43K2>.

On February 28, 2011, White had an initial appearance before the court. White was present and represented by counsel. After informing the court there would be “no benefit” to providing White with the advisories mandated by statute,² defense counsel entered a not guilty plea on behalf of White and moved to suspend the proceedings for an examination of White’s fitness.³ The district court suspended the hearing, ordered White to the Montana State Hospital, and set a review hearing in 60 days. White was civilly committed to the Montana State Hospital, never having been advised of his statutory rights.⁴ Pursuant to a court order, the hospital began involuntarily medicating White.

The court held status review hearings regarding White’s commitment on April 25, 2011, May 23, 2011, and July 11, 2011. Although White was represented by counsel at each hearing, he was never physically present for any of these hearings. At each hearing the State sought and received a continuance because Montana State Hospital had not completed White’s fitness examination. During this time, White remained committed at the Montana State Hospital. White did not believe he was mentally ill and continued to be involuntarily medicated.

On August 1, 2011, nearly six months after his first and only appearance before the district court, the court declared White unfit to proceed. Again, White was represented by counsel but not physically present at that hearing. On October 24, 2011, the district court received an updated fitness evaluation and declared White fit to proceed. White was convicted at trial of assault with a weapon. He then filed a timely appeal.

The Court has framed the issue in this appeal as whether White’s conviction of assault with a weapon must be vacated under the plain error doctrine because (1) he was not advised of his rights at his initial appearance, and (2) he was not present at all critical stages of the proceedings against him.⁵

² Mont. Code Ann. § 46-7-102 (2013).

³ Mont. Code Ann. § 46-14-202.

⁴ Mont. Code Ann. § 46-7-102.

⁵ Mont. Jud. Branch, *Judicial Branch, Oral Argument Schedule*, http://courts.mt.gov/oral_cal.mcp (accessed Oct. 24, 2014).

III. ARGUMENTS FROM THE PARTIES' BRIEFS

A. *White's arguments on appeal*⁶

1. The District Court violated White's constitutional rights by holding a competency hearing—a critical stage in his trial—when White was not personally present.

The right for a criminal defendant to be personally present during all critical stages of a trial is a fundamental right contained in the Montana Constitution.⁷ White argues all steps in a criminal proceeding that may substantially prejudice the defendant are critical stages. The right attaches under two circumstances: (1) whenever anything is done which may in any manner affect a defendant's rights; and (2) whenever a defendant's "presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."⁸ White argues a waiver of this right requires the defendant to voluntarily, intelligently, and knowingly make a statement to the court waiving his right to be present.

Addressing the harmless error standard of review, which White believes appropriate, White argues any hearing that constitutes a "critical stage" held in his absence without first acquiring a valid waiver from him is not harmless error if there is a "reasonable possibility" that his absence caused him prejudice.⁹ If the error resulting from his absence is not harmless, it is proper to overturn the conviction and remand for new trial.

Here, White argues the August 11 hearing during which he was declared unfit to proceed was a critical stage in his trial under Montana law because the further postponement of the trial affected his rights. White never waived his right to be present at this hearing. According to White, holding this hearing outside of his presence prejudiced him in three ways: (1) he did not have the opportunity to observe the demeanor of the parties, hear any arguments, or judge communicate with his counsel; (2) he did not have chance to argue he was actually mentally fit; and (3) he did not have the opportunity to argue his fitness over the next eight months while being involuntarily medicated at a mental hospital. White concludes that because he was prejudiced by his absence from the critical August 11 hearing, the District Court's error in holding the

⁶ All arguments come from the Appellant's Br. and Appellant's Reply Br., *supra* n. 1.

⁷ Mont. Const. art. II, § 24.

⁸ Br. of Appellant, *supra* n. 1, at *4 (quoting *State v. Charlie*, 239 P.3d 934, 944 (Mont. 2010)).

⁹ Br. of Appellant, *supra* n. 1, at *5 (quoting *Charlie*, 239 P.3d at 944).

hearing was not harmless; therefore, his conviction should be vacated and his case remanded for a new trial.

2. The State erred by failing to conduct a constitutionally mandated initial appearance and subsequently holding White in custody for over six months.

The Montana Constitution indicates that “no person shall be deprived of life, liberty, or property without due process of law.”¹⁰ A defendant’s right to be timely informed of the charges against him and of his basic rights during an initial appearance is a fundamental aspect of due process. The basic rights the court is required to apprise the defendant of are statutorily defined.¹¹

White argues that although he was not mentally fit to benefit from his initial appearance as originally scheduled, the State never held another initial appearance or otherwise apprised him of his rights after he was declared fit to proceed. White then argues plain error review of this decision is warranted because the error (1) raises serious questions about fundamental constitutional rights and the fairness of the proceeding; and (2) it has resulted in injustice.

White then concludes by arguing the State held him in custody and involuntarily medicated him, all without informing him of any of his rights as mandated by law and that this constitutes plain error. Therefore, White argues, his conviction should be vacated.

*B. State’s arguments on appeal*¹²

1. This Court should not invoke its power of discretionary review because no fundamental miscarriage of justice occurred when the District Court held the August 1, 2011 hearing outside of White’s presence.

The Montana Constitution provides its citizens with a fundamental right to be present during all critical stages of a criminal trial.¹³ The State argues that although neither the Montana Supreme Court nor the United States Supreme Court have determined whether a competency hearing is a critical stage of a criminal proceeding, many circuits—including the Ninth Circuit—consider these hearings to be critical stages because they safeguard a defendant from being tried if he

¹⁰ Mont. Const. art. II, § 17.

¹¹ Mont. Code Ann. § 46–7–102.

¹² All arguments come from the Appellee’s Br. and Appellee’s Reply Br., *supra* n. 1.

¹³ Mont. Const. art. II, § 17.

is unfit to stand trial and affords him an opportunity assist in his defense by observing and consulting with his counsel. The State then argues conducting a critical stage hearing outside of the presence of the defendant is subject to harmless error review. According to the State, if no reasonable possibility exists that the defendant's absence caused him prejudice, the Court should not overturn the conviction.

The State then argues that when an Appellant fails to raise a constitutional rights issue in a timely manner before the trial court, he must meet the higher standard of plain error review. According to the State, under plain error review, the Appellant has the burden to show that the error, if left unexamined, would result in such a miscarriage of justice that the integrity of the judicial system would be called into question.

Examining the facts in this case, the State argues the hearing on August 1, 2011 was not a critical stage of White's criminal proceeding. According to the State, it was not even a required competency hearing. The State's theory is when neither the State nor the defendant contests the accuracy of the report a competency hearing is unnecessary. The State argues because the neither White nor the State contested the findings of the report, the court was not required to hold the August 1, 2011 hearing; the hearing held on that date was not a competency hearing; and therefore, White's right to attend a competency hearing was not affected. The State explains under Montana law, the district court could have adopted the report's findings outside the presence of White's counsel. The State concludes by arguing White has failed to show plain error occurred.

Alternatively, the State argues that even if the competency hearing was a critical stage of White's criminal proceeding, he was not prejudiced in any way. The State argues that White does not disagree with the court's adoption of the findings and does not show how his absence at the competency hearing affected his ability to defend himself at trial. According to the State, White has not shown any prejudice occurred from the delay. The State argues White's ability to understand the legal process was serious impaired by the symptoms of White's schizophrenia. Therefore, he had no mental capacity to assist in his defense at that time. The State concludes it is unreasonable to believe that the outcome of the hearing would have been any different had White attended the proceedings. Therefore, White has not met his burden to show plain error occurred and accordingly, the Court should affirm his conviction.

2. White's counsel invited the very error he now claims warrants reversal of this conviction by informing the court not to advise his client of his statutory rights.¹⁴

Montana law requires the court to inform a criminal defendant of the charges against him and his basic rights without unnecessary delay.¹⁵ According to the State an important purpose behind requiring an initial appearance is to safeguard against defendants being held incommunicado or for indefinite periods of time.

The State argues that (1) White's counsel invited the error that now acts as the basis for his request for reversal; and further, (2) White had no capacity whatsoever to participate in the suspended initial appearance. Furthermore, the State argues White was not incarcerated indefinitely without access to counsel. The State points out he was civilly committed based, at least in part, on his counsel's request. According to the State, White fails to meet his burden to show a fundamental miscarriage of justice would occur if the Court did not review his claim.

IV. ANALYSIS

Although the Court frames the issue in this appeal as whether White's conviction of assault with a weapon must be vacated under the plain error doctrine because (1) he was not advised of his rights at his initial appearance, and (2) he was not present at all critical stages of the proceedings against him,¹⁶ the Court likely granted oral argument to answer the question of first impression of whether under Montana law, an uncontested competency hearing is a critical stage of a criminal proceeding.¹⁷

Because the Court defines a critical stage as "any step in the proceeding that has the potential to substantially prejudice the defendant,"¹⁸ it is likely a contested hearing that seeks to determine if a defendant is fit to stand trial qualifies. The State essentially concedes the point. However, the State's argument—that because White's lack of mental fitness was not disputed, the hearing was not required and cannot be considered a critical stage—will likely be a point the justices ask the State to expand on during oral argument. The persuasiveness of the answers to questions surrounding this issue will likely prove dispositive.

¹⁴ Mont. Code Ann. § 46-7-102(1).

¹⁵ Mont. Code Ann. § 46-7-101(1).

¹⁶ Mont. Jud. Branch, *Judicial Branch, Oral Argument Schedule*, *supra* n. 5.

¹⁷ See *Charlie*, 239 P.3d at 944; *State v. Peters*, 405 P.2d 642, 647 (Mont. 1965).

¹⁸ *Charlie*, 239 P.3d at 944.

Barring a strong showing by counsel for the State, it is likely the Court will rule any hearing that determines a defendant's fitness to stand trial is a critical stage regardless whether competence is disputed by either party. Because one of the protections the right provides is the ability for a defendant to assist in and observe his defense, the Court will likely be unmoved by the fact that White was represented at the hearing by counsel.

The parties disagree on the proper standard of review for White's critical stage argument. White argues that a harmless error standard is appropriate. The State counters that a plain error standard should be applied. The Court will likely ask both parties about their arguments for either standard.

Finally, given the high bar that plain error review requires White to clear, it is unlikely that his argument regarding the failure of the State to apprise him of his rights during an initial appearance will carry the day. The Court is likely to ask White to explain how a miscarriage of justice resulted when the district court followed the advice of White's own counsel in not apprising him of his rights during an initial appearance he actually attended. The State's argument that White was not without access to counsel and, at least in part, was committed at his own request, will likely be difficult for White to overcome.

Lower Court: Gallatin County Cause No. TK 11-629; Honorable Mike Salvagni, District Court Judge of the Eighteenth Judicial District.

Attorneys for Appellant, Mark Nicholas White: Wade Zolynski, Chief Appellate Defender; Gregory Hood, Assistant Appellate Defender.

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