

7-11-2014

# State v. McCabe Appellant's Reply Brief Dckt. 41357

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, )  
 )  
 Plaintiff-Respondent, ) NO. 41357  
 )  
 v. ) JEROME COUNTY NO. CR 2013-317  
 )  
 MELVIN ARTHUR MCCABE, ) REPLY BRIEF  
 )  
 Defendant-Appellant. )  
 \_\_\_\_\_ )

COPY

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF JEROME

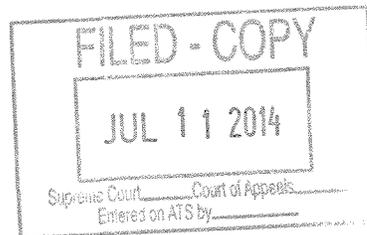
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## STATEMENT OF THE CASE

### Nature of the Case

Pursuant to a plea agreement, Melvin Arthur McCabe pleaded guilty to one count of possession of a controlled substance and to an enhancement for a previous offense. The district court imposed a unified sentence of fourteen years, with six years fixed. Mr. McCabe appeals from the district court's judgment of conviction. Mr. McCabe asserts that the district court abused its discretion when it failed to *sua sponte* order a mental health evaluation and make a determination as to Mr. McCabe's competency to represent himself. Additionally, Mr. McCabe asserts that the district court abused its discretion when it denied his motion to withdraw his guilty plea and his accompanying motion for a retroactive competency evaluation.

The State raises two arguments. The first claims that Mr. McCabe waived his right to challenge the failure of the district court to *sua sponte* order a competency evaluation when he pled guilty. The State asserts that by entering an unconditional plea of guilty, Mr. McCabe waived his right to challenge any alleged failure to order an evaluation. Secondly, the State asserts that Mr. McCabe has failed to show the district court abused its discretion in denying his motion to withdraw his guilty plea because the district court correctly concluded that Mr. McCabe's claim of incompetence was refuted by the entire record. And thus, no manifest injustice was demonstrated.

The State's first argument fails because it relies on precedent that does not apply in this case. The State's second argument fails because the record reflects several instances where Mr. McCabe's incompetence from his long-term drug use was evident.

This was true not only when he waived his right to counsel but on the day he pleaded guilty.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. McCabe's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

## ISSUES

1. Did the district court abuse its discretion when it failed to *sua sponte* order a mental health evaluation and make a determination as to Mr. McCabe's competency to represent himself?
2. Did the district court abuse its discretion when it denied Mr. McCabe's Rule 33(c) motion to withdraw his guilty plea and his accompanying motion for a retroactive competency evaluation?

## ARGUMENT

### I.

#### The District Court Abused Its Discretion When It Failed To *Sua Sponte* Order A Competency Hearing Because The District Court's Own Statements, And Those Of Mr. McCabe, Demonstrated That Mr. McCabe Was Not Competent To Represent Himself

The State's claim that Mr. McCabe waived his right to challenge any alleged failure to order a mental health evaluation fails because it relies on precedent that is distinguishable from this case. The State argues that Mr. McCabe waived his right to challenge any alleged failure to order a mental health evaluation because he entered an unconditional guilty plea. (Resp. Br. p.4.) But the State's reliance on *State v. Al-Kotrani* is misplaced for several reasons. 141 Idaho 66 (Idaho 2005). First, Al-Kotrani was represented by counsel in all the proceedings below. *Id.* at 69. Second, the district court in *Al-Kotrani* ordered a mental health evaluation as required by I.C. § 18-211. *Id.* at 68. And third, the district court there actually held a competency hearing after Al-Kotrani's evaluation. *Id.* at 69.

In its analysis as to why Al-Kotrani waived his right with his plea, the Idaho Supreme Court specifically referenced these issues. *Id.* at 69-70. It said

The Defendant argues that an allegedly incompetent defendant should not be held to have waived any rights by entering an unconditional plea of guilty. *Although such argument has some appeal, it overlooks two facts.* First, the Defendant was represented by counsel throughout the proceedings below. There is a strong presumption that his counsel's performance was within the wide range of reasonable professional assistance. *State v. Hairston*, 133 Idaho 496, 988 P.2d 1170 (1999). Second, the trial court found, after a hearing, that the Defendant was competent to stand trial. On appeal, this Court does not reweigh the evidence regarding competency, but will affirm the district court's finding if it is supported by sufficient, competent evidence, even if the evidence is conflicting. *State v. Lovelace*, 140 Idaho 53, 90 P.3d 278 (2003). Thus, the

real issue is whether the Defendant received the effective assistance of counsel when deciding to enter an unconditional plea of guilty.

*Id.* at 69-70 (emphasis added)

Here, by contrast, Mr. McCabe was not represented below for any significant period,<sup>1</sup> never underwent a mental health evaluation, and the district court never held a competency hearing. The district court did hold a *Faretta*<sup>2</sup> hearing, but, as argued in his Appellant's Brief, both Mr. McCabe's statements, and those of the district court, brought Mr. McCabe's competence into question at that hearing. (See App. Br. pp.10-11.) If indeed, the real issue in *Al-Kotrani* was whether the defendant received the effective assistance of counsel, it does not apply to this case because Mr. McCabe was not represented by counsel when he made the decision to enter an unconditional plea of guilty. And, he was incompetent when he made the decision to represent himself. Thus the State's argument fails.

## II.

### The District Court Abused Its Discretion When It Denied Mr. McCabe's Rule 33(c) Motion To Withdraw His Guilty Plea And His Accompanying Motion For A Retroactive Competency Evaluation

#### A. Introduction

The State argues that Mr. McCabe's claim that he was incompetent fails because it is refuted by the record. However, the record contains statements from Mr. McCabe

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<sup>1</sup> The order allowing his public defender to withdraw was filed on March 7, 2013, but the record indicates the public defender's first motion to withdraw was submitted on February 5, 2013. That motion stated that "the relationship between attorney and client has deteriorated to such an extent so as to leave counsel unable to effectively represent the defendant and/or his interests in this matter." (R., p.73.) Thus, Mr. McCabe was only effectively represented by counsel at his initial appearance and the preliminary hearing. (R., p.72.) Mr. McCabe did not plead guilty until May 13, 2013. (See 5/13/13 transcript.)

that demonstrate his incompetence on the day he pleaded guilty. Further, at least one document he submitted to the court also showed his incompetence, as well as his delusional and paranoid nature as he tried to represent himself prior to his guilty plea. Therefore, he asserts the district court's denial of his Rule 33(c) motion was premature because it failed to grant Mr. McCabe's motion for a retroactive competency determination.

B. The State's Argument That Mr. McCabe Did Not Demonstrate Any Manifest Injustice Fails Because The Record Demonstrates That His Plea Was Not Knowing, Intelligent, And Voluntary Due To His Long-Term Methamphetamine Use

The State asserts that “[n]othing in the record creates a genuine doubt as to McCabe's ability to understand the nature of the proceedings against him or represent himself.” (Resp. Br., p.11.) But Mr. McCabe's incompetence was evident on the day of his change of plea hearing. For example, the transcript from that hearing reflects Mr. McCabe's confusion leading up to his plea. For some reason, Mr. McCabe was under the impression that a transcript of the preliminary hearing had been prepared when in fact it was not. And he was obviously confused as to who might have ordered its preparation. The conversation went as follows:

THE DEFENDANT: Your Honor, excuse me.

THE COURT: Yes. Go ahead.

THE DEFENDANT: I haven't – and there's testimony that's in the preliminary hearing that's relevant to the trial and I haven't received the preliminary hearing transcript. I know you ordered it.

---

<sup>2</sup> *Faretta v. California*, 422 U.S. 806 (1975).

THE COURT: I never did order it. I think there was an issue as to whether or not the counsel had previously ordered the preparation of the preliminary hearing transcript, and that was discussed in the motion that I heard before counsel, but there's never been a formal request or an order submitted for the preparation of that transcript itself.

THE DEFENDANT: Ms. DePew is here and she did order it, but I didn't put it in the preliminary hearing, and then I think it got caught between my case and the case that was after mine, because she did say it after the case was over.

THE COURT: Well, I went back – when I heard the motion, I went back and listened to the recording of the preliminary hearing and there was no request for the preliminary hearing transcript on the record.

THE DEFENDANT: I guess I'm stuck out in no-man's-land there, but she did request it. It's caught between cases. I know she did. I heard it with my own ears, and she admitted it, but it's neither here nor there. I'm ready to go if—

(Tr. 5/13/13, p.4, L.7 – p.5, L.11)

Once again, these sorts of statements, and the odd, disjointed nature with which Mr. McCabe spoke should have alerted the court to Mr. McCabe's confusion and incompetence on the very day that he pleaded guilty. He was convinced a transcript had been ordered but was obviously confused as to who ordered it. And the district court confirmed that it was never ordered at all.

Moreover, one of the documents he submitted to the court prior to his guilty plea also reflected his delusional nature. In his Rebuttal to Answer responding to the State's

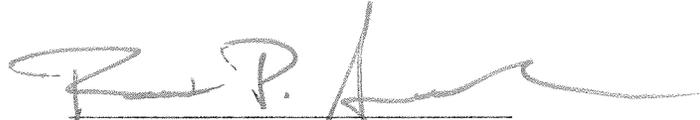
Memorandum in Opposition to Defendant's Motion to Suppress, he tried to argue that a conspiracy existed to entrap him into violating a driving suspension in order to create probable cause to arrest him. (See R. pp.293-297.) The entire document is difficult to understand. But it appears that Mr. McCabe was trying to argue that Officer Summers served him a with a "bogus" Notice of Suspension that indicated his driving privileges were suspended until January 14, 2013, when in reality there was a second Notice of Suspension pending that began on that same date. Therefore, Mr. McCabe argued that Officer Summers, the officer who arrested him, purposefully let Mr. McCabe "rely on this first notice to calculate when the administrative driving suspension had ended in order to drive," and this was an unlawful "abuse of police power designed to bamboozle McCabe into believing that the driving suspension had been lifted, all the while, entrapping McCabe into violating that same law, then using it to establish the probable cause for the arrest and subsequent search." (R., p.296.)

This sort of paranoid entrapment argument, and his confusion on the day he pleaded guilty, should have indicated to the court that Mr. McCabe was not competent. Thus because the entire record does not support the fact that Mr. McCabe's guilty plea was knowing, intelligent, and voluntary, he asserts that he has shown that manifest injustice occurred when the district court denied his motion for a retroactive competency evaluation and prematurely denied his motion to withdraw his guilty plea. Even if this court cannot say he was incompetent, his confused statements and odd arguments at least warranted a retroactive competency evaluation. Therefore, Mr. McCabe asserts the district court abused its discretion.

CONCLUSION

Mr. McCabe respectfully requests that this Court vacate his judgment of conviction and remand the case for withdrawal of the guilty plea or, in the alternative, a competency determination.

DATED this 11<sup>th</sup> day of July, 2014.

A handwritten signature in black ink, appearing to read 'R.P. Anderson', written over a horizontal line.

REED P. ANDERSON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

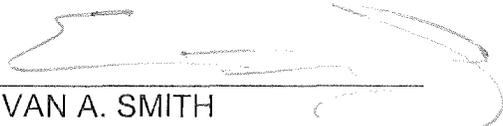
I HEREBY CERTIFY that on this 11<sup>th</sup> day of July, 2014, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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JOHN K BUTLER  
DISTRICT COURT JUDGE  
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EVAN A. SMITH  
Administrative Assistant

RPA/eas