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State v. White: Absent Waiver, is the Failure to Provide an Initial Appearance Plain Error?

Mike Wilson

No. DA 13-0589 Montana Supreme Court

Oral Argument: Wednesday, October 29, 2014 at 10:45 a.m. in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, Helena, Montana. The matter was taken into advisement just after 11:40 a.m.

I. GREGORY HOOD FOR THE APPELLANT

Mr. Hood began his argument by framing the right to be present at a critical stage of the proceedings as a personal right that exists for every defendant. Hood argued when a district court infringes upon a personal right in any way, the Court should dismiss the district court's verdict without prejudice.

After a couple of questions from Justices Rice and McKinnon concerning the Appellant's civil commitment, Justice Shea questioned Hood about the Appellant's assertion that an uncontested competency hearing is a critical stage. Justice Shea questioned whether the proceeding even constituted a hearing since the Appellant's lack of fitness was uncontested. Hood answered that although the hearing was not required by statute because fitness was uncontested, when the district court held a hearing anyway, it was a critical stage.

Despite the Appellant's assertion that any amount of prejudice was sufficient to require dismissal, several Justices asked Hood to explain how the Appellant was prejudiced when he was not contesting his fitness to proceed. Hood explained the right to be present protects the defendant's right to observe and participate in his defense. Justice Shea asked Hood whether a person who is held unfit to proceed is also unfit to observe his attorney and participate in his defense. After Hood reiterated his client's personal rights only require minimal prejudice argument, Justice Wheat asked him to explain specifically what prejudice his client suffered. When Hood explained the Appellant did not have the opportunity to observe his attorney in the proceeding, Justice Wheat responded: "That's it?"

Mr. Hood spent the remainder of his time arguing that the district court's failure to complete an initial appearance hearing—where the Appellant would have been advised of his rights and of the charges against him—warranted a dismissal of the conviction. Justice McGrath questioned whether counsel could waive an initial appearance on behalf of his client. Hood answered an attorney may not waive his client's

initial appearance. Justice Cotter asked for an explanation of the prejudice caused by the lack of an initial appearance in this case. Justice Baker questioned whether the prejudice caused was sufficient to satisfy a plain error standard. In response to both queries, Hood again argued an initial appearance is a personal right and any infringement constitutes sufficient prejudice to warrant dismissal.

II. TAMMY HINDERMAN FOR APPELLEE

Assistant Attorney General Hinderman began by arguing the Appellant could not satisfy the plain error standard of review applicable in this case. In her words, “plain error is the rare exception, not the rule.” Hinderman argued there was no prejudice caused by the Appellant’s absence from the uncontested competency hearing. According to Hinderman there was nothing for the Appellant to observe. No evidence was presented at the hearing. The district court simply followed the statute. Hinderman pointed out it is not uncommon for a defendant to be civilly committed during a criminal trial. Here, the defendant’s psychiatric issues constituted a medical emergency, and he required medication.

The Justices pressed Hinderman on the district court’s failure to provide the Appellant with an initial appearance hearing. Justice Baker asked if there was any reason the initial appearance could not have been held via video once the Appellant was fit to proceed. Hinderman answered “No.” Justice McKinnon asked if Hinderman was asking the Court to issue an opinion that said a complete lack of an initial appearance was okay. Hinderman answered although the initial appearance did not occur, many of the same things that occur during an initial appearance did occur. Hinderman explained that during an initial appearance the Appellant would have been advised of his right to an attorney—he already had one. Appellant would have been advised of his right to remain silent—he made no statements. Although Hinderman could not recall if Appellant had been advised of the charges against him, Justice McGrath pointed out bail had been set; therefore, charges must have been discussed. Hinderman concluded by stating the only thing the Appellant was not advised of that would have been covered in an initial appearance hearing was that his right to own firearms might be affected. However, she pointed out the Appellant’s previous criminal record already made him ineligible to own a firearm; therefore, he was not prejudiced by this failure to notify.

III. PREDICTION

A. Right of presence at critical stages issue

Several Justices seemed skeptical of the Appellant's claim that the uncontested competency hearing constituted a critical stage of the proceedings against him and therefore the Appellant had a right to attend the hearing—much less that he was prejudiced by his absence. Unless a majority is persuaded by the Appellant's arguments that (1) presence at a critical stage is a personal right; and (2) infringement of a personal right always constitutes plain error, it is hard to see the Appellant prevailing on this issue. The Justices did not seem moved by the Appellant's argument that while he was undoubtedly unfit to proceed, he could have played a role in his defense or even observed the proceedings. There is a better chance the Court will find the proceeding was not a competency hearing at all than they will find it was a critical stage and the Appellant was prejudiced.

B. Failure to provide an initial appearance issue

The right to an initial appearance before the court where the court informs the defendant of his rights and of the charges against him exist to ensure a defendant receives due process. In this case, the Court has three options: (1) issue an opinion that declares the lack of an initial appearance does not violate due process; (2) issue an opinion that creates a bright-line rule stating the failure to provide an initial appearance always constitutes plain error; or (3) declare that on these facts, the Appellant was not prejudiced by the lack of an initial appearance.

Based on the tone of Justice McKinnon's question regarding whether the State was seeking the first option, that option is almost certainly off the table. Of the two remaining choices—a bright-line rule or a multifactor test—the bright-line rule option seems most likely to carry the day. Although the Appellant exercised some of the rights he would have been advised of in his initial appearance, and he was likely not prejudiced by the lack of being informed of the others; even so, because an initial appearance exists to protect a fundamental right—due process—the Court will likely provide the higher protection of a bright-line rule. This option becomes even more likely when the complications involved with administering a multifactor test are considered.

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 (Argued).

Attorneys for Appellee, State of Montana: Timothy C. Fox, Montana Attorney General; C. Mark Fowler, Appellate Services Bureau Chief; Tammy A. Hinderman, Assistant Attorney General (Argued).