IN THE COURT OF APPEALS OF THE STATE OF ALASKA

LENNIE LANE III, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11019 Trial Court No. 3AN-08-13841 CR MEMORANDUM OPINION No. 6141 — January 28, 2015

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael R. Spaan, Judge.

Appearances: Dan S. Bair, Assistant Public Advocate, Appeals and Statewide Defense Section, and Richard Allen, Public Advocate, Anchorage, for the Appellant. Timothy W. Terrell, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley, District Court Judge.[*]

Judge MANNHEIMER.

The defendant in this case, Lennie Lane III, was found "guilty but mentally ill" in a post-trial hearing conducted under the procedures set out in the pre-2012 version

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

of AS 12.47.060. That is, the decision was made by the sentencing judge, not a jury, and the judge apparently used a "preponderance of the evidence" standard of proof, not a "beyond a reasonable doubt" standard (although the judge did not actually specify what standard he was using).

Lane made no objection to these procedures at the time, but it is now clear that those procedures were unconstitutional. Defendants are entitled to a jury trial on the issue of whether they should be found guilty but mentally ill, and the defendants are entitled to demand that the State prove this assertion beyond a reasonable doubt. *See State v. Clifton*, 315 P.3d 694 (Alaska App. 2013).

On appeal, Lane asks us to vacate his guilty but mentally ill verdict and direct the superior court to hold a jury trial on this issue, as required by *Clifton* and as provided by the current version of AS 12.47.060.

The State responds that Lane is not entitled to relief because his attorney did not object to the superior court's handling of the "guilty but mentally ill" determination. In fact (as the State points out), Lane's attorney affirmatively *asked* the superior court to find Lane guilty but mentally ill.

As we explain in this opinion, the real problem in this case — a problem that neither party addresses — is that Lane's attorney raised the issue of whether Lane should be found guilty but mentally ill, and Lane's attorney affirmatively asked the superior court to find Lane guilty but mentally ill, but there is nothing in the record of the superior court proceedings to show that Lane understood, much less consented to, his attorney's actions.

We therefore direct the parties to file briefs addressing the question of whether, when the defense asks the court to enter a verdict of guilty but mentally ill, the judge is required to personally address the defendant and make sure that the defendant understands and consents to the entry of this verdict.

An overview of the procedural history of this case

Lennie Lane III was charged with first-degree sexual assault, second-degree physical assault, and evidence tampering. Lane had obvious mental health issues; he was initially found incompetent to stand trial. But later, after Lane was declared competent to stand trial, Lane's attorney announced that he would not raise any defense based on mental disease or defect.

At trial, the jury found Lane guilty of all the charges against him.

Following the trial, but prior to sentencing, Lane's attorney filed a motion asking the superior court to make a post-verdict finding (under the procedures described in AS 12.47.060) that Lane was guilty but mentally ill.

If the court entered this verdict, Lane would be statutorily entitled to mental health treatment while he was in prison (as long as he remained dangerous because of a mental disease or defect). [1] But at the same time, because of this verdict, Lane would be ineligible for parole or furlough release as long as he was receiving this mental health treatment, and he would potentially face a petition for involuntary mental commitment at the end of his sentence. [2]

The superior court responded to the defense attorney's motion by holding a hearing. At this hearing, the court heard testimony from the psychologist who had previously examined Lane. But more importantly (as we will explain in more detail later), the prosecutor and the defense attorney both *stipulated* that Lane should be found guilty but mentally ill.

Based on the attorneys' stipulation, the superior court declared Lane to be guilty but mentally ill. And following Lane's sentencing, the superior court incorporated

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[1] AS 12.47.050(a)-(b); *State v. Clifton*, 315 P.3d 694, 699 (Alaska App. 2013).

[2] AS 12.47.050(d)-(e); *Clifton*, 315 P.3d at 699.

this finding into its written judgement against Lane — adding the words: "The Court has determined that the [d]efendant is [g]uilty, but mentally ill."

All of this happened in 2010 and 2011, when AS 12.47.060 was in its pre-2012 form. This prior version of the statute was unconstitutional because it authorized a sentencing judge to make a post-trial determination that a defendant was guilty but mentally ill using a "preponderance of the evidence" standard of proof. As this Court explained in *State v. Clifton*, this statute denied defendants their Sixth Amendment right to jury trial, and the corresponding right to demand proof beyond a reasonable doubt, as construed in *Blakely v. Washington*. [3]

Now, in the present appeal, Lane (who is represented by a new lawyer) contends that the superior court committed plain error by making the "guilty but mentally ill" determination itself, rather than submitting this issue to a jury, and by making this determination under a "preponderance of the evidence" standard rather than a "beyond a reasonable doubt" standard. In other words, Lane argues that the superior court committed plain error by following the unlawful procedures specified in the version of the statute that was in effect at the time.

This claim of plain error fails, not because the challenged procedures were constitutional (indeed, they were not), but because the court acted purely at the behest of Lane's attorney.

It was Lane's attorney who affirmatively asked the superior court to find Lane guilty but mentally ill, when neither the State nor the court had raised this issue. And when the superior court suggested that any ruling on this issue should be deferred until Lane could be examined by two psychologists (as provided in AS 12.47.070(a)), Lane's attorney told the court that he wanted to "get it done right now" — in order to

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[3] 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

"save a lot of problems" and "foreclose any possibility that the doctors would not find [Lane] to be mentally ill".

Thus, any procedural error in this case was directly invited by Lane's attorney. Or, to put it another way, there is no indication that Lane's attorney would have done anything different even if someone *had* suggested that Lane was entitled to a jury trial and to proof beyond a reasonable doubt. Lane's attorney wanted the superior court to find Lane guilty but mentally ill, and he urged the court to forego any procedural steps that might impede that result.

But as we explained at the beginning of this opinion, the real problem is that there is no indication that Lane understood, much less consented to, his attorney's actions.

A closer look at the litigation in the superior court

As we described earlier, while Lane was awaiting sentencing, his attorney, Jon Buchholdt, filed a pre-sentencing motion asking the superior court to find Lane guilty but mentally ill. At the hearing on this motion, held in early February 2011, the prosecutor expressed surprise at the unusual circumstance of a defendant's asking the court for a guilty but mentally ill verdict:

> *Prosecutor*: Most often it's the State that raises this [verdict], ... because it's often seen as a punitive measure. A person who's [found guilty but mentally ill] still serves their full lawful sentence. They're just provided with an extra degree of treatment or medication — which would be provided anyway. ... [P]erhaps an extra degree of [treatment] would be provided under this track. [But] it is viewed as a negative, because a person who is [guilty but mentally ill] and receiving treatment is not eligible for discretionary parole. ...

> [The] chances are [that Mr. Lane] wouldn't live long enough to see the possibility of discretionary parole anyway — which is why, I imagine, defense counsel is making this request. I view it as a tactical decision to serve Mr. Lane's best interests under the circumstances, by seeing that he does get that extra degree of treatment. ...
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> The State could even stipulate to the defendant being mentally ill. And perhaps [we should get] a few words from [the] defendant, to allow the Court to ... find that [verdict] by a preponderance of the evidence today, and [then] we could proceed with the sentencing.

After some discussion regarding the desirability of obtaining expert testimony on Lane's mental condition, the superior court addressed Lane's attorney:

> *The Court*: Is your goal, Mr. Buchholdt, to have me find [your client] mentally ill?
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> *Defense Attorney*: Yes.
>
> *The Court*: If we could do it right now, do you [still] want me to have — Why do you want to have him examined by two people?
>
> *Defense Attorney*: You raise a good point. If I could get it done right now, then ... we could save a lot of problems. And that would probably foreclose any possibility that the doctors would not find him to be mentally ill.
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> *The Court*: It would, indeed, if that's what you want[.]

The superior court then heard testimony from the psychologist who had previously examined Lane. The psychologist told the judge that she diagnosed Lane as

having a delusional disorder — and that, with this diagnosis, Lane fit the legal definition of "guilty but mentally ill".

Immediately after the psychologist offered the opinion that Lane might properly be found guilty but mentally ill, the following colloquy occurred between Lane's attorney, the court, and Lane himself:

> *Defense Attorney*: I'll accept that. [To Lane:] Do you want to accept that?
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> *Lane*: What's that?
>
> *Defense Attorney*: Would you like the court now to determine that you're mentally ill, so you can be sentenced under that statute?
>
> *Lane*: Well, I'd like to give this — I've got some letters here. I don't understand what's being said. But I've got some letters I want the judge to look at, since I have filed an attorney grievance [against you] pertaining to [your] conduct during trial.
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> *The Court*: Okay. Mr. Lane, ... we [have] vacated your sentencing. We'll get it [rescheduled] as soon as we can.
>
> I will make the finding, based on the testimony and materials I have, that Mr. Lane is guilty but mentally ill.
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> Now, as far as the grievance with your lawyer, you could file an appeal [raising] ineffective representation, [or you could] contact the Bar Association. But giving me some letters — there's nothing I could do with them right now, because Mr. Buchholdt is abl[y] representing you at this point, okay?

Lane: Well, ... my case is still in review, and I'm just — and I had another attorney that wanted to be here ... for a merit appeal or post-conviction relief.

The Court: Okay. But ... [w]e've got to [enter] a judgment before you could appeal, okay?

Lane: So ... when are you saying that you would like to sentence me? ... I'd rather not do it today. I'd rather be committed back to the hospital. If you can hear me out on that.

The Court: Well, look, here's what's going to happen. ... Once I enter the judgment and find you guilty but mentally ill, the statutes provide that you need to be provided, and must be provided, mental health help. Now, it doesn't provide that you necessarily are going to be in API [the Alaska Psychiatric Institute]. The Department [of Corrections] could have you in custody and provide those services. [Addressing the psychologist, who was still on the phone] Am I correct, Doctor?

Psychologist: He would not be [at API]. He would be in [Department of Corrections] custody.

The Court: Okay. But the services would be provided to him. ... [And being sentenced is] going to make it easier for you to get to the starting line as far as any appeal or ... any other post-conviction relief matters, once there's a judgment. ... So you tell me what you want to do.

Lane: I'm not prepared to go to sentencing today.

The Court: Very good.

This was the last discussion of the "guilty but mentally ill" issue at the pre-sentencing hearing. This issue did not come up again until Lane's sentencing, ten weeks later.

Toward the beginning of that hearing, the superior court asked Lane's attorney if he had any argument to present on Lane's behalf. The defense attorney started out by asserting that, at the previous hearing, the judge had adjudicated Lane "guilty but mentally ill". But the judge disagreed with Buchholdt's characterization of what had occurred at the prior hearing. The judge declared that he had not "adjudicated" anything; instead, he claimed to have merely accepted the attorneys' stipulation that Lane should be found guilty but mentally ill:

> *The Court*: ... No, no. And that's [reflected] on my notepad, too. ... A lot of people don't like [a verdict of guilty but mentally ill] because it could, in theory, restrict his release date if they thought more treatment was necessary. I read your [motion]. I asked [the prosecutor] whether or not he would object, without putting the psychologist on the stand or getting a report. ... He told me no, [he would not object] if, in fact, you thought that [your client] would be better treated and get more mental health help when he was in custody. So I didn't — I accepted a stipulation of counsel based on the facts that I had before me. But we didn't have a competency hearing.
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> . . .
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> *Defense Attorney*: Well, based upon the stipulation ... which you accepted, and now [that] he's been declared mentally ill, we would like to have him sentenced to a mental hospital.
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> *The Court*: You know I can't do that. ... They [*i.e.*, the Department of Corrections] could treat him in the Sixth Avenue [correctional] facility, or they could send him to API. ... But I can't tell the [Department] where to house him. I

> could tell them they've got to give him the special attention he needs, and I'm more than willing to do that. And I could recommend that he go to API, at least initially, and I'd be happy to do that. But there's no guarantees in me doing that, is all.
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> *Defense Attorney*: Well, we'd appreciate the recommendation.

Lane did not participate in this conversation.

The judge then proceeded to sentence Lane — declaring that Lane was being sentenced as someone who was found guilty but mentally ill. The judge stated that this verdict was based "on the facts [he] was privy to, [and on] your request, and [on] the stipulation of the district attorney".

The potential problems with the superior court's "guilty but mentally ill" finding

Even though the superior court declared at the sentencing hearing that it was honoring Lane's "request" to be found guilty but mentally ill, the record fails to show that Lane ever *personally* requested the court to do this, or that Lane ever expressly acquiesced in his attorney's request for this verdict.

The only time that Lane personally said anything about this issue was during the pre-sentencing hearing in February 2011, when his attorney, Buchholdt, asked Lane if he was willing to accept the psychologist's conclusion that he could properly be found guilty but mentally ill. As we have already described, Lane responded to his attorney's question by saying that he did not understand what his attorney was talking about — and that he wished to complain about the quality of his attorney's representation.

Almost immediately after Lane made these comments, and despite the fact that Lane had just declared that he did not understand what his attorney was talking about, the judge announced that he was finding Lane guilty but mentally ill.

As this Court noted in *State v. Clifton*[4] and in several earlier cases,[5] a finding that a defendant is guilty but mentally ill is "a new type of verdict in criminal cases" — a novel verdict created by the legislature in 1982 when it enacted AS 12.47, the chapter relating to mental illness and criminal responsibility.[6] See, in particular, AS 12.47.040, AS 12.47.050(a), and AS 12.55.145(f), all of which speak of the "verdict" of "guilty but mentally ill".

As defined in AS 12.47.030(a), a verdict of guilty but mentally ill constitutes a finding that the government has proved all the elements of the charged offense (including all required culpable mental states), *plus* an additional finding that, because of mental disease or defect, the defendant either (1) "lacked ... the substantial capacity either to appreciate the wrongfulness of [their] conduct" or (2) lacked the substantial capacity "to conform [their] conduct to the requirements of law." As we held in *Clifton*, the defendant is entitled to trial by jury, and to demand proof beyond a reasonable doubt, with respect to these issues.[7]

Not only do our statutes describe "guilty but mentally ill" as a discrete verdict in criminal cases, but AS 12.55.145(f) — the statute that contains the rules for deciding which of a defendant's prior felony convictions alter the defendant's status for presumptive sentencing — expressly speaks of *pleas* of "guilty but mentally ill":

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[4] *Clifton*, 315 P.3d at 697, 699-700.

[5] *See*, *e.g.*, *Lord v. State*, 262 P.3d 855, 856 (Alaska App. 2011), and *Lewis v. State*, 195 P.3d 622, 637 (Alaska App. 2008).

[6] *See* SLA 1982, ch. 143, § 22.

[7] 315 P.3d at 702, 707.

> [For purposes of] this section, a prior conviction has occurred when a defendant has entered a plea of guilty, guilty but mentally ill, or nolo contendere, or when a verdict of guilty or guilty but mentally ill has been returned by a jury or by the court.

It appears that just such a "plea" occurred in Lane's case: after the jury found Lane guilty at trial, Lane's attorney expressly asked the superior court not to enter a verdict of "guilty", but rather a verdict of "guilty but mentally ill".

But if the actions of Lane's attorney effectively constituted a plea of guilty but mentally ill, that plea was offered — and accepted by the superior court — in violation of the rules that govern pleas in criminal cases.

Under Alaska Professional Conduct Rule 1.2(a), a defense attorney in a criminal case "shall abide by [their] client's decision ... as to [the] plea to be entered". But the record in this case indicates that Lane did not even understand what his attorney was doing when the attorney asked the court to find Lane guilty but mentally ill.

In addition, under Alaska Criminal Rule 11(c), when a defendant offers a plea of guilty or no contest in a criminal case, the court must address the defendant personally to make sure that the defendant (1) understands what allegations they are conceding, (2) understands the general consequences of making that concession, and (3) understands that they are giving up their right to jury trial and their right to demand that the government prove the allegations beyond a reasonable doubt.

The superior court did none of that here.

It is true that Criminal Rule 11(c) speaks only of pleas of guilty and no contest. But if, indeed, Alaska law now recognizes a plea of "guilty but mentally ill", then there is substantial reason to believe that the procedural requirements of Criminal Rule 11(c) apply to those pleas as well.

We direct the parties to brief these issues

As explained in the preceding section of this opinion, we have substantial doubts as to whether the procedures followed in this case — the procedures that led the superior court to find Lane guilty but mentally ill — comport with Alaska law.

But the parties to this case did not identify or discuss these concerns in their briefs to this Court. We therefore direct them to do so.

Within 60 days of the issuance of this decision, Lane's appellate attorney shall file a supplemental brief addressing the concerns we have raised here. The State shall then have 45 days to file a responding brief.

If the Public Defender Agency wishes to participate in this case by filing an *amicus* brief, the agency may file an appropriate motion within the next 15 days.

After we have received the parties' briefs, we will renew our consideration of Lane's appeal.