District Court, El Paso County, State of Colorado Court Address: 270 South Tejon Colorado Springs, CO 80903-2203 Phone Number: (719)452-5000	DATE FILED: November 3, 2020 DATE FILED: November 3, 2020 11:00 AM
PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. Letecia Stauch, Defendant.	▲ COURT USE ONLY ▲ Case Number: 20CR1358 20CR3170 Div.:15S Ctrm: S403

[D-21] ORDER DENYING USE OF VIDEO OR AUDIO RECORDING DURING COMPETENCY EVALUATION

This matter comes before the Court regarding the People's request to require the second competency evaluation conducted at the request of the Defendant be video and audio taped.

Because there seems to be significant confusion in the record regarding the manner in which motions are to be filed with the Court, the Court will start there first. This Court previously issued its [O-2] Order regarding the Procedure for Filing Motions and Responses. Counsel and their staff are ORDERED to review that Order in detail and comply with it in the future to avoid confusion in this matter. While it may seem like a mundane or small issue, it is important that counsel follow the procedures set forth in the Court's [O-2] Order to maintain clarity in the record.

On September 18, 2020, Stauch filed her [D-19] Brief Regarding the Use of Video and Audio Recording During Competency Evaluation. The gist of that brief objected to the People's request that Stauch's competency evaluation be recorded. On September 24, 2020, Stauch filed another [D-19] Motion to Authorize 30 Hours for Second Competency Evaluation. Obviously, this should have been a [D-20] motion. On September 28, 2020, Stauch filed her [D-20] Motion Requesting Dr. Grimmett be Permitted to Review the Video-Recording of the First Competency Evaluation. Similarly, this should have properly been labeled as Stauch's [D-21] motion. The People have similar filing difficulties. On October 16, 2020, the People filed their [P-20] Response to Defense Brief Regarding the Use of Video and Audio Recording During Competency Evaluation. Because this was a response to a filing by Stauch, it should have been labeled [D-19] as there is no [P-20] motion that has been filed by the People. In fact, in its introductory paragraph, the People's response states it is a response to the [D-19] defense brief. The confusion was then compounded by Stauch's next filing which was titled [D-21] Response to People's Motion Regarding the Use of Video and Audio Recording During a Competency

Evaluation. No People's Motion Regarding the Use of Video and Audio Recording During a Competency Evaluation is contained in the file. As indicated above, the People's filing appears to be a response to the [D-19] Brief filed by Stauch. Procedurally, there is a motion, response and reply. There is no response to a response. In addition, there is no [D-21] motion in the record. Rather, Stauch's most recent filing appears to be a reply to the People's response referenced above and should have been labeled a [D-19] reply, if the People had correctly labeled their filing as a [D-19] response.

This Court has previously presided over complex cases involving a large number of filings. It inures to the benefit of the attorneys and the Court for the attorneys to follow the procedural filing methods established by the Court. That way anyone can review the pleadings to easily find the [D-19] motion and its related [D-19] response and [D-19] reply. In this case, the Court had to review two different [D-19] pleadings and determine that the People's [P-20] response was actually a response to one of the [D-19] pleadings and then determine that the [D-21] response was not a response at all but rather a reply to what had been improperly labeled a [P-20] response. If counsel or their staff have any questions regarding what is expected of them, please ask for further clarification. Future filings that do not comply with the Court's Order will be stricken and counsel will need to refile them correctly.

To avoid further confusion in the record, the next motion from the defense should be labeled a [D-22] motion. Any response to the [D-22] motion is a [D-22] response. Any reply to that response is a [D-22] reply. The next motion from the People should be labeled a [P-21] motion. Any response to the [P-21] motion is a [P-21] response. Any reply to that response is a [P-21] reply.

Now to the substance of the dispute.

The defense previously raised the issue of Stauch's competency by their [D-15] motion filed June 4, 2020. The matter proceeded to a hearing on June 5, 2020. At that time, the People requested the competency evaluation of Stauch be audio and video recorded. In support of that request, the People cited both C.R.S. §§16-8-106(1)(b) and -108(1)(a). The defense did not object at that time. The Court then issued its [D-15] Order for competency evaluation requiring the evaluation be video and audio recorded as provided by the statutes referenced by the People.

The competency evaluation took place. It was video and audio recorded in compliance with the Court's [D-15] Order. The Court and counsel were provided with a copy of that evaluation. However, at a hearing which occurred on September 3, 2020, the defense objected to the video and audio recording which had been done. The Court had not reviewed the recording. The People represented that they had not reviewed the recording and it had been placed in evidence. The Court ordered that no one review the recording until Stauch's objection could be briefed and heard. Stauch then filed her [D-19] brief on September 18, 2020.

The People advance several arguments supporting their claim that Stauch's competency evaluation should be video and audio recorded: (1) Stauch has waived her claim of privilege, (2) the sanity statutes require recording of an evaluation, (3) C.R.Cr.P 16(a)(1)(VIII) requires the prosecution to turn over all recorded statements of the defendant, (4) C.R.S. §16-3-601 requires

the recording of a defendant's statements during a custodial interrogation and (5) recording a defendant's competency evaluation is the best evidence for all parties. None of these arguments have any merit.

WAIVER OF PRIVILEGE DOES NOT REQUIRE RECORDING OF A COMPETENCY EVALUATION

The People accurately point out that when a defendant raises the issues of competency to proceed, any claim of confidentiality or privilege is deemed waived. C.R.S §16-8.5-104(1). However, that does not mean that recording of the evaluation is either required or even permitted. In fact, the competency statute says nothing at all about the issue. This omission is important when considering the People's second argument.

COLORADO'S INSANITY STATUTES DO NOT REQUIRE RECORDING OF A COMPETENCY EVALUATION

The People correctly argue that C.R.S. §16-8-106(1)(b) requires the interview for an *insanity* examination be recorded when a class 1 or 2 felony charge is involved. Similarly, C.R.S. §16-8-108(1)(a) requires recording of a second *insanity* evaluation that has been requested by a defendant. Those statutory requirements were passed through the enactment of SB 16-019 on June 10, 2016 and became effective January 1, 2017. This is an important consideration as the Colorado legislature had also passed HB 16-1410 containing a revision to C.R.S. §16-8.5-105 regarding evaluations and reports for competency proceedings a little more than a month earlier. When HB 16-1410 was passed on May 4, 2016, it did not contain a provision that competency evaluations be recorded. Some of the representatives that sponsored the changes in the insanity statutes are the same representatives that also sponsored HB 16-1410. Surely, if those representatives wanted a similar recording requirement in HB 16-1410 that they expressly placed in SB 16-019, they would have included one.

The legislative history also reveals that statutes regarding competency evaluations and reports were substantially rewritten in SB 19-223 that became effective July 1, 2019. SB-223 was sponsored by some of the same Senators who had sponsored the changes to the insanity statutes in 2016 which required recording of sanity evaluations where class 1 or 2 felonies are charged. Nevertheless, SB 19-223 did not contain any requirement that competency evaluations be recorded. Again, if the same Senators who wrote the bill in 2016 that required recording of *insanity* evaluations had wanted to include a similar requirement that *competency* evaluations be recorded, they could have done so. They did not.

The express language in the respective statutes also does not help the People. C.R.S. §16-8-106(1)(b) regarding insanity evaluations requires that any interview conducted "*pursuant to this section* must be video and audio recorded and preserved." "[T]his section" as used refers to section 106 of Article 8 of Title 16. It does not refer to any section of the competency evaluation statutes. Similarly, C.R.S. §16-8-108(1)(a) provides that when a second evaluation is done "under this article" at the request of the defense, that evaluation must be video and audio recorded and preserved. "[T]his article" refers to Article 8 of Title 16 governing insanity evaluations and says nothing about Article 8.5 governing competency evaluations.

The People next argue that even though nothing in C.R.S. § 16-8.5-101, *et seq.* (the competency statutes) requires audio or video recording, the Court should permit it in this case. The Court disagrees.

Given the legislative history set forth above and the contemporaneous nature of the changes made to both the statutes regarding insanity and competency evaluations, the Court declines to read such a recording permission in the competency statutes. Stated differently, the Court should not construe the provision requiring recording of an insanity evaluation while not requiring the recording of a competency evaluation as unintentional. *Auman v. People*, 109 P.3d 647, 656-657 (Colo. 2005)("just as important as what the statute says is what the statute does not say ... We should not construe those omissions by the General Assembly as unintentional.").

In addition, the People's argument that, since the competency evaluation statutes are silent on whether a competency evaluation can be recorded, such recording is not prohibited is without merit. A similar argument was raised by the prosecution and rejected by the Colorado Supreme Court in *People v. Kilgore*, 455 P.3d 746 (Colo. 2020). In that case, the trial court had ordered a defendant to disclose exhibits he intended to use to the prosecution 30 days prior to trial. The prosecution in that case argued that, since C.R.Cr.P. 16(II) was silent on the obligation of the defense to disclose exhibits, the trial court was free to impose the disclosure requirement. In rejecting that argument, the Colorado Supreme Court stated:

> The prosecution actually has it backwards. It posits that a district court has authority to order any discovery that is not specifically prohibited by Rule 16. But Rule 16 is not a rule of prohibition. It delineates what discovery is required or permitted, not what discovery is prohibited. As *Richardson* and *E.G.* make clear, a district court has authority to order only discovery that is specifically authorized by Rule 16. Thus, an omission from Rule 16 signifies something a district court *lacks* authority to order, not something it *has* authority to order. *Kilgore*, 455 P.3d at 751 (emphasis in original).

Similarly, the competency statutes at issue in this case do not contain any authority permitting recording of a competency evaluation.

RULE 16 DOES NOT REQUIRE RECORDING OF THE COMPETENCY EVALUATION

The People argue that their obligation to disclose the Defendant's statements pursuant to C.R.Cr.P 16(a)(1)(VIII) requires or permits recording a competency evaluation. The Rule says nothing about the defense obligation to disclose statements of the Defendant to the prosecution. As indicated above, a similar argument as that made by the People here was expressly rejected in *Kilgore*.

C.R.S. §16-3-601 DOES NOT PROVIDE A BASIS FOR RECORDING A COMPETENCY EVALUATION

The People cite C.R.S. §16-3-601 for the proposition that Stauch's competency evaluation must or should be recorded. The People's argument has no merit. HB 16-1117 revised C.R.S. §16-3-601 to require a peace officer conducting a custodial interrogation of a class 1 or 2 felony to electronically record the interrogation. HB 16-1117 was enacted on June 10, 2016 a mere 8 minutes *after* SB 16-019 referenced above which established the recording requirements for insanity evaluations. C.R.S. §16-3-601 says nothing about competency evaluations. Pursuant to the same analysis used above, the Court finds that C.R.S. §16-3-601 does not provide any basis for recording a competency evaluation. Finally, while the statute does require the peace officer conducting the interrogation to record the interrogation, the evaluation in this case is being conducted by Dr. Grimmett, not a peace officer.

THE BEST EVIDENCE RULE DOES NOT PROVIDE AUTHORITY FOR RECORDING A COMPETENCY EVALUATION

The Best Evidence Rule is set forth in Rule 1002 of the Colorado Rules of Evidence. Rule 1002 states, "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute of the State of Colorado or of the United States." The Rule has no applicability in determining whether a competency evaluation in a criminal case should be recorded.

In addition, accepting the People's argument would require every competency and sanity evaluation of a defendant to recorded. Not even the statutes referenced by the People require that. The same logic would also require every appointment for medical care of an injured person in a criminal or civil case to be recorded. The People have not provided any citation of authority in support of their conclusion that the Best Evidence Rule requires recording of the competency evaluation and the Court is not aware of any.

CONCLUSION

The difference in recording requirements between sanity and competency evaluations has a sound basis in the law. A sanity evaluation will likely reveal direct evidence bearing on an element that the People must prove at trial, i.e. whether the Defendant had the specific intent to commit or knowingly committed a crime or was instead insane *at the time of the crime* and was unable to form the requisite *mens rea* for the crime charged. In that case, both sides would likely call experts to testify regarding their respective evaluations and findings. *The jury* would then resolve the disputed factual matter. A competency evaluation has no similar evidentiary value as it only determines whether the Defendant has *the present mental capacity* to understand the proceedings against her in such a fashion that the case may constitutionally proceed forward. Based on the presentation of evidence on the issue, *the Court* then makes a determination regarding whether the defendant is competent to stand trial. If the matter ultimately proceeds to trial, the jury may never even hear whether competency was raised as an issue in the case.

For the reasons set forth herein, the Court DENIES the People's request that Dr. Grimmett's competency evaluation be recorded. In addition, the People are PROHIBITED from viewing the copy of the audio visual recording of Stauch's competency evaluation which was previously completed at CMHIP.

SO ORDERED this 3rd day of November, 2020.

BY THE COURT:

Gregory R. Werner
District Court Judge