

Transcript Of Proceedings

USA v Giffen

March 20th, 2019



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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION
HON. MUSTAFA T. KASUBHAI, MAGISTRATE JUDGE
COURTROOM NO. 3

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)Case No.
)6:18-mj-00236-MK
TODD MICHAEL GIFFEN,)
)
 Defendant.)
)
)

TRANSCRIPT OF PROCEEDINGS
WEDNESDAY, MARCH 20, 2019

APPEARANCES:

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Reported by: Jan R. Duiven
 CSR, FCRR, CRC

1 WEDNESDAY, MARCH 20, 2019; 2:22 P.M.

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4 COURTROOM DEPUTY: Magistrate case
5 No. 18-236, United States of America versus Todd
6 Michael Giffen for status conference.

7 MR. BOFFERDING: Good afternoon,
8 your Honor.

9 THE COURT: Good afternoon.

10 MR. HUYNH: Yes, your Honor. I've
11 talked to defense counsel. The defendant is not
12 present --

13 THE COURT: Oh, he's not here today?

14 MR. HUYNH: -- today because of a --
15 just a delay in transferring him. His competency
16 evaluation was completed quite --

17 THE COURT: I did see a report
18 indicating that --

19 MR. HUYNH: Correct.

20 THE COURT: -- he was not found fit
21 to proceed.

22 MR. HUYNH: That's the
23 recommendation of the medical examiner. I
24 informed defense counsel of this last week, that
25 he wasn't going to make it today, to see if he

1 wanted to continue the matter. He was going to
2 appear which could be as early as next week
3 according to the marshals. However, I believe
4 defense counsel still wants to go have the status
5 conference to lay out some matters on the record,
6 so I'll defer to defense counsel.

7 THE COURT: Mr. Bofferding.

8 MR. BOFFERDING: Yes, please, your
9 Honor. Todd Bofferding for Mr. Giffen. In the
10 last couple days I received a plethora of phone
11 calls from Mr. Giffen, and from other people
12 across the country, people from New York, people
13 from Texas.

14 THE COURT: Associated with
15 Mr. Giffen?

16 MR. BOFFERDING: I'm sorry?

17 THE COURT: The plethora of calls
18 other than from Mr. Giffen were --

19 MR. BOFFERDING: Were from --

20 THE COURT: -- associated --

21 MR. BOFFERDING: -- other people,
22 associates of Mr. Giffen, residing in New York and
23 Texas, Nevada, and elsewhere.

24 THE COURT: What's a plethora?

25 MR. BOFFERDING: A lot. A whole

1 lot. An amazing amount.

2 THE COURT: Well, I knew that, but
3 what's a number?

4 MR. BOFFERDING: At least 15.

5 THE COURT: Okay.

6 MR. BOFFERDING: At least 15. I
7 want to be able to put something on the record
8 even though Mr. Giffen is not adjudged to be
9 competent at this time, he still asked me to put
10 something on the record, as does a lot of other
11 people who have been calling me.

12 I want to be able to say that by the
13 marshals not transporting Mr. Giffen to court
14 today is a direct violation of fundamental
15 fairness, violates due process in that it causes a
16 delay in justice.

17 There is also an Eighth Amendment
18 violation for cruel and unusual punishment by
19 forcing Mr. Giffen to stay at the federal medical
20 center in SeaTac longer than he needs to. The
21 evaluation process was completed early this month.
22 The argument is that the marshals had plenty of
23 opportunity to get him here. From what I
24 understand is the bus needs to be filled or
25 substantially filled in SeaTac for the marshals to

1 transport people down.

2 THE COURT: And you understand that
3 from what source?

4 MR. BOFFERDING: I understand that
5 from my prior discussions with the marshals on
6 cases like this. When they're transporting people
7 around the country, they -- they have a habit.
8 They just don't send one person down. They wait
9 till there's more people to move for financial
10 reasons.

11 I understand that from an
12 administrative standpoint; however, waiting for a
13 bus to be filled does not create an exception to
14 due process.

15 Mr. Giffen is requesting to be
16 released, whether it be on conditions or
17 otherwise, or in the alternative, to have his case
18 dismissed for violation of due process. That's
19 the argument that I have and that's all I have at
20 this time on this issue.

21 THE COURT: Mr. Huynh.

22 MR. HUYNH: Yes, your Honor. This
23 issue of delays in transport -- in fact, any
24 transport of these defendants for either
25 competency proceedings or restoration of

1 competency proceedings --

2 THE COURT: And if I understand,
3 though, Mr. Giffen was going to be transported
4 here for this status conference.

5 MR. HUYNH: Correct.

6 THE COURT: So it's not a delay
7 associated of him getting to a bed or a facility.

8 MR. HUYNH: No. But it's still a
9 delay associated with his current status of being
10 somewhat in the process of determining competency.

11 So it's still part and parcel with the whole
12 procedure of him going to give an evaluation and
13 then coming back to have a hearing and then
14 proceeding from there.

15 The due process clause, we've argued
16 before the Court, is not invoked in these cases.

17 It's invoked in cases where there's no legitimate
18 reason to -- to justify what they would argue is
19 unreasonable incarceration, but we haven't. We
20 haven't with the competency proceedings.

21 The speedy trial clock specifically
22 enunciates these types of delays that -- while the
23 competency determination still outstanding is
24 excludable. In this case, factually, we actually
25 have a pretty expeditious evaluation. You have

1 him on December 5th being ordered by this Court
2 for a competency. He was sent to SeaTac on
3 January 10th. An evaluation was done in 35 days
4 under the 45 days requirement of Court order.

5 The Court got its order on -- the
6 opinion from the -- the medical examiner on
7 March 11th. There was no request for an extension
8 or anything like that, which is, again, quite
9 rare. So this was done very quickly, his
10 examination.

11 The only issue is that the
12 transport, again, has to be done effectively. He
13 was -- he likely would be here tomorrow or the day
14 after up in Portland. Getting him down to Eugene
15 is additional delay. As I indicated to defense
16 counsel, he could be here next Wednesday for this
17 matter. And, thus, I don't believe there's any
18 reason to claim that there's been undue delay in
19 this case or any delay that would justify a due
20 process claim for dismissal.

21 THE COURT: All right. Help me
22 understand. The reason for him not being
23 transported for today's date was?

24 MR. HUYNH: I didn't get the
25 details. I asked of the marshals, but my

1 understanding was that there was just a logistical
2 issue. It could be what Mr. Bofferding indicated.
3 I don't know that. But I do know that sometimes
4 they have to coordinate transports of multiple
5 individuals. I can't say that's right or wrong in
6 this case.

7 THE COURT: And at what point were
8 both of you made aware that there was going to be
9 this delayed transporting of Mr. Giffen?

10 MR. HUYNH: Last week. I believe it
11 was about middle of last week the marshals
12 indicated that to me, and I informed that --
13 Mr. Bofferding of that immediately to see how he
14 wanted to proceed.

15 I also included him in the email
16 chain loop to see if he had any questions of the
17 marshals as well. And I asked of the marshals
18 when could he -- when is the earliest he could
19 arrive so we could inform the Court and try to set
20 this orally.

21 THE COURT: And, Mr. Bofferding, you
22 wanted to maintain this status conference to make
23 these issues -- make these -- make these issues on
24 the record --

25 MR. BOFFERDING: Correct.

1 THE COURT: -- for the Court to
2 consider.

3 Okay. All right. It always seems
4 like I'm the last one to hear about the delays.
5 So how is it that we can make sure that I'm
6 advised of this in advance of the hearing? And it
7 might be that you don't want to, I guess, burden
8 the Court with these things, but at the same time,
9 I think given that Mr. Giffen's circumstances are
10 unique, and with respect to competency issues, I
11 think it raises probably more -- more questions
12 that don't have to be otherwise raised.

13 Maybe we're working even more
14 preemptively or proactively in scheduling --
15 scheduling these status conferences when you have
16 someone as well versed as Mr. Giffen being able to
17 communicate his concerns.

18 MR. HUYNH: Well, again, I think we
19 would have informed the Court had we sought to
20 continue this matter as to why we weren't
21 continuing it. So I think that was where we were
22 trying to go with this, which is to inform the
23 Court there was delay, and then continue the
24 status conference for a time when he would be
25 here.

1 But, otherwise, you know, it was a
2 decision to inform the Court at this hearing
3 rather than prior to that.

4 THE COURT: All right.

5 MR. HUYNH: Based on defense
6 counsel's request to have the hearing. Outside of
7 that, I mean, if the Court would like, we could
8 try to confirm in advance status conferences with
9 folks in transport if they're going to be here,
10 but that's typically not what we do because of all
11 the numbers of transports. So if we hear
12 otherwise, we inform defense counsel and we see
13 how they want to proceed.

14 THE COURT: All right. So you're
15 asking me to dismiss the case, Mr. Bofferding?

16 MR. BOFFERDING: Yes. Or in the
17 alternative, release on conditions.

18 THE COURT: All right.

19 MR. HUYNH: And just a reminder, on
20 the release issue, this is a defendant who was
21 charged with making threats to a public figure.
22 Who, during his own removal proceedings, insulted
23 and threatened the magistrate judge in Chicago and
24 then proceeded to come here and also had some
25 issues in this court as well.

1 THE COURT: And is it your
2 contention that a one-week delay in his status
3 conference would be that violation of due process?

4 MR. BOFFERDING: Well, it's going to
5 have to be more than one week. I'm a member of
6 the Board of Bar Examiners. They're sending us to
7 Sunriver Friday to begin grading bar exams.

8 THE COURT: You know, that's a
9 difficult one for me to feel sympathetic over,
10 Mr. Bofferding.

11 MR. BOFFERDING: I understand. I
12 understand. There's board meetings and other
13 things entailed. That's my schedule. And if the
14 marshals would have brought him here, we would be
15 on schedule.

16 THE COURT: All right.

17 MR. BOFFERDING: So my schedule
18 should not be the reason for violation of due
19 process. It's because it all started he wasn't
20 transported per court order of a case setting
21 where my client never waived personal appearance.

22 THE COURT: All right. But you're
23 available the following week?

24 MR. BOFFERDING: I am.

25 THE COURT: All right.

1 MR. BOFFERDING: I am. And what
2 we're --

3 MR. HUYNH: Actually, the discussion
4 was --

5 MR. BOFFERDING: Go ahead.

6 MR. HUYNH: -- based on his
7 schedule, we talked about April 9th, I believe,
8 Tuesday, April 9th, as a possibility because
9 that's going to likely have to be a contested
10 competency hearing. I'm going to have to get
11 either by PTC or personal appearance the
12 physician. I've been told that we're still going
13 to have to put on evidence next.

14 THE COURT: How long do you
15 anticipate that hearing to take?

16 MR. HUYNH: On the Government's
17 side, it would take no more than about 15 to
18 20 minutes to go over the evaluation. I've done
19 this before here. However, the defendant has a
20 right to ask questions. The defendant has a right
21 to also speak on his own behalf at these
22 proceedings, and I can't say on that how long that
23 would take.

24 THE COURT: How long do you
25 anticipate your side of the case?

1 MR. BOFFERDING: It depends how long
2 Mr. Giffen desires to speak on his behalf. He has
3 a right to testify. I have a right to control
4 everything else.

5 And what I expect to happen is that
6 I -- my professional responsibility requires, I
7 believe, and my duty to the Court as well, is that
8 I will not present a case that opposes competency,
9 but my client will in his statement.

10 THE COURT: All right.

11 MR. BOFFERDING: So I can't tell you
12 how long it will be. Potentially a half hour.

13 THE COURT: Okay. So 15 minutes,
14 30 minutes, 45 minutes. I calculate that to be
15 about two hours.

16 MR. BOFFERDING: Correct. Yeah.

17 THE COURT: So we could take this up
18 after the regular 1:30 docket that following --
19 that Wednesday. Is that April 10th, Jackie?

20 COURTROOM DEPUTY: Yes.

21 THE COURT: Yes. We'll keep it on
22 the 10th of April and take it up at the end of the
23 docket.

24 MR. HUYNH: Yes, your Honor.

25 MR. BOFFERDING: And would that be

1 set as a contested competency hearing as opposed
2 to a mere status conference?

3 MR. HUYNH: I would argue that we
4 should just have the hearing, your Honor. There's
5 no need to have conference to then set the
6 contested hearing. Let's just have the hearing if
7 they want it.

8 MR. BOFFERDING: I agree.

9 THE COURT: As do I.

10 MR. BOFFERDING: Good.

11 THE COURT: So let's make sure that
12 everyone comes ready to present evidence on the
13 competency hearing.

14 MR. BOFFERDING: Yes, your Honor.

15 COURTROOM DEPUTY: Competency
16 hearing is set for April 10th, 2019, at 1:30 p.m.,
17 before Judge Kasubhai.

18 THE COURT: And perhaps to clarify,
19 then, for the record that even though I recognize
20 that Mr. Giffen had not been transported for
21 today's status conference, today, if he had
22 appeared -- if he had appeared, we would have had
23 to reset a contested competency hearing out to,
24 more likely than not, that April 10th date.

25 So in terms of whatever concerns

1 that I might have had with respect to some
2 prejudice on Mr. Giffen, it is resolved by being
3 able to set the competency -- contested competency
4 hearing as early as it would have otherwise been
5 set had Mr. Giffen been transported today.
6 However, I clearly recognize that he otherwise has
7 a right to appear in person for all of these
8 proceedings.

9 MR. BOFFERDING: Very well, your
10 Honor.

11 THE COURT: Thank you.

12 MR. HUYNH: Thank you, your Honor.

13 (The proceedings recessed at 2:35 p.m.)
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C E R T I F I C A T E

STATE OF OREGON)
)
County of Lane)

I, JAN R. DUIVEN, Certified Shorthand Reporter for the State of Oregon, in and for the County of Lane, do hereby certify that the foregoing pages 1 of 15, comprise a complete, true, and correct transcript, to the best of my ability, of the proceedings held in the above-entitled matter on WEDNESDAY, MARCH 20, 2019.

Dated at Eugene, Oregon, this 27th day of March, 2019.



JAN R. DUIVEN, CSR, FCRR, CRC
Certified Shorthand Reporter