REL: 04/30/2010

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2009-2010

CR-08-1507

Kevin Cook

v.

State of Alabama

Appeal from Talladega Circuit Court
(CC-08-266)

PER CURIAM.

The appellant, Kevin Cook, was convicted of first-degree burglary, a violation of § 13A-7-5, Ala. Code 1975, and was sentenced pursuant to the Habitual Felony Offender Act to life imprisonment. This appeal followed.

The State's evidence tended to show the following: On February 26, 2008, at approximately 9:00 p.m., an individual the victim, S.W., later identified as Cook, came through the front door[1] of her residence, jumped on her as she was sitting on a sofa near the door, and attempted to rip off the T-shirt she was wearing. When Cook was unsuccessful in ripping the T-shirt off he pulled out a knife and tried to cut the shirt off. S.W. testified that while Cook was holding her down he kept repeating that he wanted to "f--- her" and "e-- her." (R. 188-89.) During the struggle, Cook hit S.W. in the head with a lamp and she struck him with a candleholder. S.W.'s dog also grabbed Cook's pants leg and S.W. began throwing things at Cook. Cook then left through the front door. As he was leaving he said, "'I'll be back after you, you white b----'" and "'I'm not through with you yet.'" (R. 191.) S.W. sustained injures to her head and cuts as a result of the attack.

Cook did not testify at trial. The defense called Dr. Barry Collins, a physician who treated Cook while he was

[1]S.W. testified that she thought that she had shut and locked the front door. However, she said that it was hard to shut the door because the house was being remodeled and the door had been replaced and repainted.

incarcerated at the Talladega County jail. Dr. Collins testified that he was called to the jail on April 3, 2009, to examine Cook because Cook was on suicide watch. He stated that Cook had a history of schizophrenia with bipolar tendencies and that he had been treated for those disorders. Dr. Collins prescribed Thorazine, an antipsychotic; Depakote, a mood stabilizer; Cogentin, for the side effects of the Thorazine; and Prozac for depression because Cook had taken those medications in the past. He stated that if Cook was not taking his medications, he would not know the difference between right or wrong. However, on cross-examination, Dr. Collins testified that, at the time that he evaluated Cook in the jail after the instant offense, he believed that Cook understood right from wrong. When asked if he had any knowledge concerning Cook's mental state at the time of the offense, Dr. Collins testified:

> "Given his prior history and that schizophrenia has less than a 13 percent remission rate, I would assume that he would still be schizophrenic based -- when I saw him that day that he still displayed flights of ideas being he was schizophrenic on that day, that he had the same mental illness that he's been diagnosed with over the last several years."

(R. 270.) When asked about Cook's actions during the burglary, Dr. Collins said that Cook may have been experiencing a manic episode.

On appeal, Cook raises one issue. He argues that the circuit court erred in denying his pretrial motion for a court-ordered mental evaluation to determine his mental competency at the time of the offense. The State asserts that the trial court did not abuse its discretion in denying Cook's request for a mental evaluation.[2]

Section § 15-16-21, Ala. Code 1975, provides, in pertinent part:

> "If any person charged with any felony is held in confinement under indictment and the trial court shall have reasonable ground to doubt his sanity, the trial of such person for such offense shall be suspended until the jury shall inquire into the fact of such sanity. ..."

Rule 11.2(a)(2), Ala. R. Crim. P., provides:

> "Mental Condition at Time of Offense. If the defendant has timely raised a defense of 'not guilty by reason of mental disease or defect' either by the entry of a plea or by filing a pre-trial motion pursuant to Rule 15, the court on its own motion may

[2]We note that, although Cook raised the issue of his competency to stand trial below, he appears to have abandoned that issue on appeal because he claims error only in the trial court's failure to order a mental evaluation to determine his competency at the time of the commission of the offense.

> order, or the defendant, the defendant's attorney, or the district attorney may move for an examination into the defendant's mental condition at the time of the offense."

The United States Supreme Court in Ake v. Oklahoma, 470 U.S. 68, 83 (1985), first recognized that an indigent defendant may be entitled to the assistance of a mental-health expert. The court stated:

> "[W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right."

(Emphasis added.) Alabama courts have consistently followed the Ake v. Oklahoma holding:

> "[A]n indigent defendant is constitutionally entitled to a psychological expert provided at the State's expense where the defendant demonstrates to the trial court that his or her sanity at the time of the offense could be a significant factor at trial. Ake v. Oklahoma, 470 U.S. 68, 86, 105 S.Ct. 1087, 1097-98, 84 L.Ed.2d 53 (1985). Where an evaluation by a psychologist or psychiatrist is constitutionally required, such an expert may be

> appointed under Rule 11.3(a), Ala. R. Crim. P.; Isom v. State, 488 So. 2d 12, 13 (Ala. Cr. App. 1986)."

Russell v. State, 715 So. 2d 866, 869 (Ala. Crim. App. 1997). See also Glass v. State, 14 So. 3d 188 (Ala. Crim. App. 2008); Morris v. State, 956 So. 2d 431 (Ala. Crim. App. 2005); Burgess v. State, 962 So. 2d 272 (Ala. Crim. App. 2005); White v. State, 900 So. 2d 1249 (Ala. Crim. App. 2004); Nicks v. State, 783 So. 2d 895 (Ala. Crim. App. 1999); May v. State, 710 So. 2d 1362 (Ala. Crim. App. 1997); Jones v. State, 680 So. 2d 964 (Ala. Crim. App. 1996); Dubose v. State, 662 So. 2d 1156 (Ala. Crim. App. 1993); Ford v. State, 630 So. 2d 111 (Ala. Crim. App. 1991); McGahee v. State, 554 So. 2d 454 (Ala. Crim. App. 1989).

> "Before the trial judge suspends the normal course of criminal proceedings and conducts a jury inquiry into the 'fact of sanity' there must come to his attention factual data, or allegations of factual data, tending to show 'reasonable ground to doubt [the accused's] sanity.'"

Brinks v. State of Alabama, 465 F.2d 446, 450 (5th Cir. 1972), quoted in part in Glass v. State, 14 So. 3d at 191-92 (emphasis added).

At arraignment, Cook entered a plea of not guilty by reason of mental disease or defect, and he requested that he

be permitted to undergo a mental evaluation. The circuit court conducted a hearing on the motion. During the hearing, Cook's counsel introduced medical records from the Alabama Department of Corrections. The prison records showed that Cook had received psychotropic medications while incarcerated on a previous offense and that he had a history of "depressed feelings" and "paranoid ideas," as well as "diagnosis [of] schizophrenia, bipolar." (R. 7-8.) The records also showed that Cook was "intellectual functioning borderline[,] memory, borderline." (R. 9.) Trial counsel also stated that Cook had a "history of [taking] psychotropic medication and previous psychiatric hospitalizations." (R. 9.) Counsel stated:

> "I don't know if he really understands the -- I guess, the gravity of the charges that are against him, but also his mental state at the time that this was committed. I believe that he was on medication up until the time he was released from St. Clair. And once he was out, he was not on any medication."

(R. 10.) Counsel also informed the court that Cook's cousin had told her that he picked Cook up when he was released from St. Clair Correctional Facility, shortly before the burglary, and that he believed that Cook was not taking his medications at that time.

At the conclusion of the hearing, the circuit court informed the parties that it would review the records counsel had introduced at the hearing. Thereafter, the circuit court entered the following order denying the motion for a mental evaluation:

> "This matter coming on before the Court on the 26th day of January 2009 based on [Cook's] Motion for Court ordered Mental Examination; the presence of the District Attorney; the presence of counsel for the Defendant; counsel for [Cook] introducing Defendant's Exhibit #1 containing medical records from the Alabama Department of Corrections and a prior Forensic Evaluation Report dated the 25th of February, 1998; statements made in open court; the Court having taken judicial knowledge of its file; and upon consideration thereof, the Court finds as follows:
>
> "1. [Cook] previously had before the Circuit Court of Talladega County, Alabama Case No. CC-1997-079 for Burglary in the First Degree, and Case No. CC-1997-080 for Attempted Burglary in the Second Degree. These cases were before then Presiding Circuit Judge Jerry Fielding. Judge Fielding ordered a mental evaluation of [Cook] and subsequently received a report that clearly indicated that [Cook] was able to assist his counsel in the defense of these cases and was not suffering from a severe mental disease or defect.
>
> "2. Subsequent to the disposition of the aforesaid two cases before Judge Fielding, [Cook] had a case before the undersigned Circuit Judge and no request was made for a mental evaluation. Subsequent to that case, [Cook] had two felony cases before Judge Fielding and no request was

> made for a mental examination. Subsequent to those two cases, [Cook] had a felony case before Judge William E. Hollingsworth, III and no request was made for a mental examination.
>
> "3. The Court has reviewed the medical records from the Alabama Department of Corrections that were introduced as Defendant's Exhibit #1. The Court's review included the prior Forensic Evaluation Report of [Cook]. This Court finds that there are no reasonable grounds for a mental examination of [Cook] and the Motion is due to be denied."

(C. 14-15.) Subsequently, Cook filed a motion for funds for an expert psychologist or psychiatrist and a motion to continue. (C. 17-22.) The case action summary sheet does not indicate that the circuit court formally ruled on those motions; however, it appears that the circuit court believed that it had denied the motions.

Before Cook would be entitled to a mental evaluation to inquire into his competency at the time of the offense, he was required to show reasonable grounds to doubt his competency. See Ake v. Oklahoma, 470 U.S. at 83. This standard was met in this case. The record shows that Cook pleaded not guilty by reason of mental disease or defect, that Cook's prison medical records reflected that he had a history of schizophrenia, that he had been treated and was taking medications for that

condition while he was incarcerated, and that shortly before the burglary he was released from prison and may not have been taking his medication. "Before the trial judge suspends the normal course of criminal proceedings and conducts a jury inquiry into the 'fact of sanity' there must come to his attention factual data, or allegations of factual data, tending to show 'reasonable ground to doubt [the accused's] sanity.'" Brinks, 465 F.2d at 450.

The circuit court had sufficient facts before it from which to conclude that there were reasonable grounds to doubt Cook's mental competency at the time of the offense. Indeed, the record shows that Cook's mental health was a significant factor at his trial. The circuit court abused its discretion in denying Cook's motion for a mental evaluation. "[T]he evidence presented to the trial court warranted further inquiry into [the defendant's] mental competence." Ex parte Gordon, 556 So. 2d 363, 365 (Ala. 1988). Cook is entitled to a new trial. See Ake v. Oklahoma, 470 U.S. at 87.

Accordingly, Cook's conviction is hereby reversed and this case is remanded to the circuit court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Wise, P.J., and Welch, Windom, and Kellum, JJ., concur; Main, J., dissents, with opinion.

MAIN, Judge, dissenting.

I respectfully dissent from the per curiam opinion reversing Cook's conviction for first-degree burglary and remanding the case.

Cook was charged by indictment with first-degree burglary, a violation of § 13A-7-5, Ala. Code 1975. Cook argues that the circuit court erred in denying his pretrial motion for a court-ordered mental evaluation to determine his mental competency at the time of the offense. The per curiam opinion has set out the applicable law, and my analysis is in accordance with those legal principles.

In my opinion, Cook did not meet his burden of showing a reasonable ground to doubt his competency at the time that he committed the burglary of S.W.'s residence. His motion for a mental evaluation was supported by medical records from the Alabama Department of Corrections indicating that he had

previously received psychiatric treatment for depression, paranoia, and schizophrenia while he was incarcerated as the result of other convictions. However, as for Cook's competency at the time he committed the burglary, Cook's counsel stated that, although she believed Cook could assist with his defense, she believed that Cook did not understand the seriousness of the offense. She also informed the court that Cook's cousin believed that Cook was not taking his medications after his release from St. Clair Corrections. Although Cook's cousin was present during the hearing on the motion, he did not testify. Instead, Cook's counsel informed the court that the cousin's testimony would simply be that he had picked Cook up on his release from St. Clair Correctional Facility and that he believed that Cook was not taking his medications at that time. At the conclusion of the hearing, the circuit court indicated that it would review the records and enter an order, stating as follows:

> "THE COURT: Thank you very much. What I'm going to do is I'm going to take it under advisement and peruse these records and determine what's in them. And that's what prompted me to inquire before because of the fact that I know that it's sort of puzzling that he was ordered to Taylor Hardin [Secure Medical Facility] back in the '90s, got a report, after the report came in, he pled guilty to

> two felonies. And then he's been not only before Judge Fielding subsequent to that, he's been before Judge Hollingsworth and he's been before me, and there's been no indication of any mental disease or defect and three separate judges have found him to be competent and proceeded to take his pleas and sentence him in those particular cases. And I can tell you, if I had felt like in 2001 that he had a severe mental disease or defect and couldn't assist his lawyer when he was before me, it would give me cause and I'm sure it would have done the same thing in front of Judge Hollingsworth and Judge Fielding. And that's why I was interested in seeing whether or not any motions had been filed in those particular cases. And you did a great job getting his records from the Department of Corrections. But I've got to look at them and look back at the report."

(R. 12-13.). Thereafter, as set out in the per curiam opinion, the circuit court fashioned a detailed written order setting out its reasons for denying the request for a court-ordered mental evaluation. (C. 14-15.)

I do not believe that the trial court abused its discretion in denying Cook's request for a mental examination because Cook failed to present evidence at the hearing on the motion generating reasonable grounds to doubt his mental competency at the time of the offense. Further, I do not believe that the sole witness the defense called at trial provided sufficient reasonable grounds as to Cook's mental competency at the time of the offense. Dr. Barry Collins, who

evaluated Cook on April 3, 2009, after the offense but before trial, indicated that Cook understood right from wrong when he examined him on that one occasion at the jail. He stated that he had no opinion concerning Cook's mental condition in February 2008, at the time the offense was committed, because he treated Cook only that one time while he was in jail on a suicide watch. During the evaluation, Cook denied having suicidal thoughts and admitted that he cut himself because he wanted to be moved because the cell he was in was too crowded. He stated that Cook may have been in a manic episode when he committed the burglary given Cook's prior diagnosis of schizophrenia with bipolar tendencies. Dr. Collins prescribed antipsychotic medication for Cook in April 2009. However, Dr. Collins indicated that Cook made a decision to cut himself to be removed from his crowded cell before he was medicated, which he stated was a goal-oriented decision on Cook's part.

I believe the circuit court is in a better position than an appellate court to rule on a request for a mental evaluation by virtue of its ability to hear and see the evidence and to observe the defendant. In this case, the only testimony presented at the hearing was Cook's attorney's

assertion that Cook did not understand the gravity of the charges against him and that he expected Cook's cousin to testify that he believed that Cook was not taking his medications on the date he was released from prison, which was approximately one month before the burglary occurred.

> "[C]ounsel's assertion regarding [a defendant]'s lack of understanding of the proceedings, being unsupported by any evidence, was not sufficient to raise a bona fide doubt as to [the defendant]'s competency. See, e.g., Nelson v. State, 511 So. 2d 225, 238 (Ala. Crim. App. 1986), aff'd, 511 So. 2d 248 (Ala. 1987) ('In the absence of any evidence, the mere allegations by counsel that the accused is incompetent to stand trial or was insane at the time of the commission of the offense do not establish reasonable grounds to doubt a defendant's sanity which would warrant an inquiry into his competency.'). See also Frazier v. State, 758 So. 2d 577, 587 (Ala. Crim. App.), aff'd, 758 So. 2d 611 (Ala. 1999), and Cliff v. State, 518 So. 2d 786, 791 (Ala. Crim. App. 1987)."

Harrison v. State, 905 So. 2d 858, 862 (Ala. Crim. App. 2005). No evidence was presented that Cook exhibited psychotic behavior immediately before the commission of the offense. See Russell v. State, 715 So. 2d 866 (Ala. Crim. App. 1997) (reversing decision and remanding case where defendant exhibited psychotic behavior after being released from prison and evidence indicated that he received treatment for such behavior after being released). Dr. Collins, who evaluated

Cook after the offense and who testified for the defense at trial, indicated that Cook made a goal-oriented decision and was not taking medication for schizophrenia when he made the decision to cut himself.

Therefore, in my opinion, Cook failed to meet his burden of persuasion on this matter. Accordingly, I would hold that the circuit court did not abuse its discretion in denying Cook's motion for a court-ordered mental evaluation to determine his mental competency at the time of the offense. Thus, I would affirm.