FILED BY CLERK
MAR 21 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. VINCENT ALPHONSO POWELL, Appellant.	2 CA-CR 2010-0139 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20080296

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Vincent Powell was convicted of five counts of armed robbery, one count of attempted armed robbery, six counts of aggravated assault with a deadly weapon or dangerous instrument, and one count of assault. He was sentenced to twelve concurrent sentences of life in prison and one sentence of time served.[1] The trial court ordered this sentence to be served consecutively to his sentence to life in prison imposed in another proceeding. On appeal, Powell argues the court erred in finding he was competent to stand trial and in refusing to order his competency be reevaluated based on later changes in his behavior and medication.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). The charges against Powell stem from five armed robberies and one attempted armed robbery of businesses in central Tucson. Three other proceedings were pending against Powell at the time of the instant proceedings. The trial court stayed all four proceedings and ordered an evaluation of Powell's competency to stand trial. Ultimately, a final competency report concluded Powell was both malingering and "capable of assisting his attorney in a rational and factual manner if he chooses to do so." The court found Powell

[1]The sentencing minute entry incorrectly states Powell was convicted of a second count of attempted armed robbery. However, it cites the assault statute, A.R.S. § 13-1203, and correctly states he was sentenced to time served on that count. The jury returned a verdict finding Powell guilty of assault on count seven, and the trial court orally sentenced him for assault. *See State v. Leon*, 197 Ariz. 48, n.3, 3 P.3d 968, 969 n.3 (App. 1999) (oral pronouncement of sentence controls when different from minute entry). Therefore, the sentencing minute entry is amended to delete the reference to attempted armed robbery on count seven and instead to include assault. *See id.*

competent to stand trial. Following a trial in another of the proceedings, he was tried in this case although he voluntarily absented himself from the trial. This appeal followed.

Initial Competency Determination

¶3 Powell contends the trial court erred in finding him competent to stand trial. However, the state alleges Powell is collaterally estopped from challenging this finding because this court already has ruled on this issue in *State v. Powell*, No. 2 CA-CR 2009-0350 (memorandum decision filed Oct. 29, 2010), in which this court affirmed the trial court's rulings on Powell's competency. The doctrine of collateral estoppel is applicable in a criminal case, both in favor of and against the defendant. *State v. Forteson*, 8 Ariz. App. 468, 472, 447 P.2d 560, 564 (1968). In order for collateral estoppel to preclude a party from raising an issue: "the issue sought to be relitigated must be precisely the same issue and must have been adjudicated in the previous litigation; a final decision on the point in question must have been *necessary* for the judgment in the prior litigation; and there must be mutuality of parties." *State v. Robles*, 183 Ariz. 170, 175, 901 P.2d 1200, 1205 (App. 1995).

¶4 We first must determine whether the issue in Powell's previous appeal was precisely the same as here. The trial court joined all of Powell's proceedings for purposes of determining his competency. And although Powell includes facts from his second trial in this portion of his opening brief, his first argument does not appear to challenge the court's refusal to reevaluate Powell's competency, but rather its initial finding of competency. This court considered Powell's challenge to the initial finding of competency in his previous appeal. *Powell*, No. 2 CA-CR 2009-0350, ¶ 6. The precise

issue was litigated and adjudicated in the previous litigation. *See Robles*, 183 Ariz. at 175, 901 P.2d at 1205.

¶5 Powell argues, without citing to any authority, that this court's decision in *Powell* is not final, presumably because he has filed a petition for review to the Arizona Supreme Court in that case. But, for purposes of res judicata or collateral estoppel, a judgment is final even if an appeal has been filed. *Ariz. Downs v. Superior Court*, 128 Ariz. 73, 76, 623 P.2d 1229, 1232 (1981); *see also Murphy v. Bd. of Med. Exam'rs*, 190 Ariz. 441, 449, 949 P.2d 530, 538 (App. 1997). Therefore, a petition for discretionary review does not affect the finality of this court's decision in *Powell*. Additionally, Powell does not contest the other requirements of collateral estoppel—that the decision was necessary to the judgment or that there is mutuality of the parties. Consequently, Powell is collaterally estopped from challenging the trial court's initial finding of competency. *See Robles*, 183 Ariz. at 175, 901 P.2d at 1205.

Reevaluation of Competency

¶6 Powell further contends the trial court abused its discretion by denying his motions to reevaluate his competency. "We review the trial court's determination of whether to require an evidentiary hearing on competency for abuse of discretion." *State v. Kuhs*, 223 Ariz. 376, ¶ 8, 224 P.3d 192, 195 (2010).

¶7 As a preliminary matter, most of the reports, motions and proceedings to which Powell refers occurred before this case was severed from the other proceedings against him. In his previous appeal, Powell argued the trial court erred by failing to reevaluate his competency during that trial. *Powell*, No. 2 CA-CR 2009-0350, ¶ 11. We

held there that "the court did not abuse its discretion in rejecting Powell's numerous requests for additional competency evaluations." *Id.* ¶ 19. Accordingly, Powell is collaterally estopped from appealing from any motions or raising any arguments based on any conduct during any proceeding considered in his previous appeal. *See Robles*, 183 Ariz. at 175, 901 P.2d at 1205. We do consider, however, those arguments based solely on the trial underlying this appeal.

¶8 A trial court is required to order a psychological examination of a defendant only if reasonable grounds exist to question whether the defendant is competent. *See Kuhs*, 223 Ariz. 376, ¶ 13, 224 P.3d at 196. The presence of a mental illness alone "is not grounds for finding a defendant incompetent to stand trial." Ariz. R. Crim. P. 11.1; *see State v. Moody*, 208 Ariz. 424, ¶ 56, 94 P.3d 1119, 1139 (2004). Rather, the test for competency is whether a mental illness renders a criminal defendant "unable to understand the proceedings against him or her or to assist in his or her own defense." Ariz. R. Crim. P. 11.1; *see Moody*, 208 Ariz. 424, ¶ 56, 94 P.3d at 1139.

¶9 And when the trial court has presided over an initial Rule 11, Ariz. R. Crim. P., proceeding, it does not abuse its discretion by considering evidence presented at that hearing when it denies a subsequent Rule 11 motion. *See Kuhs*, 223 Ariz. 376, ¶ 16, 224 P.3d at 196; *Moody*, 208 Ariz. 424, ¶ 48, 94 P.3d at 1138 ("[I]f a defendant has already been adjudicated competent, the court must be permitted to rely on the record supporting that previous adjudication."). Moreover, "[i]n determining whether reasonable grounds exist [for further competency evaluations or proceedings], a judge may rely, among other

factors, on his own observations of the defendant's demeanor and ability to answer questions." *Moody*, 208 Ariz. 424, ¶ 48, 94 P.3d at 1138.

¶10 Powell contends his decision not to attend his trial was "highly unusual" and showed "a lapse in rational thinking." However, he engaged in an in-depth conversation with the trial court explaining that he did not want to attend. And the court found him to be "very rational" and "very calm." It found "he ha[d] made a rational decision for himself that he [did not] want to be present at his trial." A defendant may waive his right to be present at trial under Rule 9.1, Ariz. R. Crim. P. Powell cites no authority supporting the proposition that waiving a right as allowed by the Arizona Rules of Criminal Procedure shows a lack of competence or that choosing to waive that right gives the court reasonable grounds to order a competency evaluation. *See Kuhs*, 223 Ariz. 376, ¶ 13, 224 P.3d at 196.

¶11 At the close of the trial underlying this appeal, Powell, through counsel, again raised the issue of his competence, stating he was still not competent to stand trial. However, Powell did not refer to any specific reasons why he was incompetent and, thus, did not give the trial court reasonable grounds to order an examination at that point. *See id.*

¶12 Next, Powell argues he "exhibit[ed] a lack of connection to reality at his sentencing hearing."[2] At the hearing, Powell stated he "liked [the judge] like a dad," and

[2]Powell also alleges the trial court was uncertain whether its finding would be affirmed on appeal and "[t]he court's uncertainty should be a factor." Even if Powell correctly interprets the transcript to show uncertainty, he does not cite any authority supporting his position or explain how the court's uncertainty would be a factor on appeal

that defendants of other crimes, such as "murderers, child molesters, [and] rapists" would receive less time than him. He claimed a counselor made sexual advances to him when he was a child and another made advances to him as an adult. Even if these statements were due to mental health issues rather than malingering, they do not demonstrate that Powell was unable to understand the proceeding. *See* Ariz. R. Crim. P. 11.1; *see also Moody*, 208 Ariz. 424, ¶ 56, 94 P.3d at 1139.

¶13 Powell relies heavily on *Maxwell v. Roe*, 606 F.3d 561 (9th Cir. 2010), for the proposition that a trial court should reevaluate a defendant's competence based on his trial behavior and one previous report of incompetence. However, Maxwell had attempted suicide during trial and had been placed on a "psychiatric hold" for seventy-two hours, which was extended to two weeks. *Maxwell*, 606 F.3d at 570-71. This hold could only be extended in an "extreme instance," and Maxwell was reported to be "'a danger to himself'" and "'gravely disabled.'" *Id.* at 572. The reports prepared in conjunction with this hold stated that Maxwell was "'actively psychotic'" and involuntarily had been administered heavy doses of an antipsychotic drug. *Id.* at 573. Powell does not report any deterioration of this sort between his first trial and the end of this trial. Instead, his actions remained consistent with his prior diagnosis of malingering. The trial court did not abuse its discretion by denying Powell's motions to reevaluate his competency.

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in evaluating his competence. Thus, he has waived this issue. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (issue waived when argument insufficient to permit appellate review).

Conclusion

¶14 In light of the foregoing, we affirm Powell's convictions and sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge