IN THE COURT OF APPEALS OF IOWA

No. 2-1115 / 12-0081
Filed February 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JODY NOLAN MCCULLAH,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

Jody Nolan McCullah appeals from the district court's ruling on remand that he was competent to represent himself at his 2008 sexual abuse trial. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, Martha J. Lucey, Assistant Appellate Defender, and Andrew W. Craig, Student Intern, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John Sarcone, County Attorney, and Jeff Noble, Assistant County Attorney, for appellee.

Heard by Eisenhauer, C.J., and Danilson and Bower, JJ.

DANILSON, J.

Jody Nolan McCullah appeals from the district court's ruling on remand that he was competent to represent himself at his 2008 sexual abuse trial. Because the record supports the district court's conclusion that the defendant was competent to represent himself at trial, we affirm.

I. Background Facts and Proceedings.

The underlying facts leading to McCullah's convictions are set out in *State v. McCullah*, No. 08–0403, 2010 WL 5394747, at *1-7 (Iowa Ct. App. Dec. 22, 2010). McCullah had represented himself at trial. *McCullah*, 2010 WL 5394747, at *7. On appeal McCullah did not dispute he was competent to stand trial; however, he asserted the district court erred in not considering, sua sponte, his mental impairment in determining whether to grant his request to waive his right to counsel and to represent himself at trial, relying upon *Indiana v. Edwards,* 554 U.S. 164 (2008). *See McCullah*, 2010 WL 5394747, at *8.

Because the trial court had not had the benefit of *Edwards*, we remanded for a hearing "to determine whether McCullah was competent to represent himself at trial in light of the standards established in *Edwards*," restating what we had said in *State v. Jason*, 779 N.W.2d 66, 76 n.2 (Iowa Ct. App. 2009) :

> We emphasize that the issue to be decided on remand is not whether the defendant lacked the technical legal skill or knowledge to conduct the trial proceedings effectively without counsel. . . . That fact, however, has no bearing on whether he was competent to represent himself for purposes of *Edwards.* Rather, the determination of his competence or lack thereof must be predicated solely on his ability to "carry out the basic tasks needed to present his own defense without the help of counsel"; [*Edwards,* 554 U.S. at 175–76,]; notwithstanding any mental incapacity or impairment serious enough to call that ability into question. Of course, in making this determination, the trial court should consider the

> manner in which the defendant conducted the trial proceedings and whether he grasped the issues pertinent to those proceedings, along with his ability to communicate coherently with the court and the jury.

See McCullah, 2010 WL 5394747, at *10 n.3.

On remand, the district court[1] conducted a hearing, carefully reviewed the transcripts of the criminal trial, and found (1) McCullah was not suffering from a severe mental illness at the time of trial, (2) the trial judge was attentive to and satisfied that McCullah was competent to represent himself, and (3) McCullah's trial performance was not affected by mental illness.

McCullah challenges the district court's ruling, inviting us to adopt a more specific standard than enunciated in *Edwards* and *Jason*, but also arguing that the court incorrectly found him competent under the standard announced in *Edwards.*

II. Scope and Standard of Review.

We review constitutional claims de novo. *State v. Oliver*, 812 N.W.2d 636, 639 (Iowa 2012).

III. Analysis.

"A defendant has a Sixth and Fourteenth Amendment right to self-representation under the United States Constitution." *State v. Cooley*, 608 N.W.2d 9, 14 (Iowa 2000) (citing *Faretta v. California,* 422 U.S. 806, 807 (1975)). The right to represent oneself is not absolute, however; the court must investigate whether the defendant is properly competent to represent himself.

[1] The actual trial judge had retired before being able to comply with our remand order necessitating another judicial officer to preside over the remand proceedings. We commend the district court in accepting the unique challenge and task in complying with our remand order although he was not the trial judge.

Indiana v. Edwards, 554 U.S. 164, 177 (2008). Competency to stand trial and competency to self-represent are governed by two different standards. *Id.* at 175. Some defendants may fall into a "grey area" between the mental ability to stand trial and fitness to represent themselves. *State v. Jason,* 779 N.W.2d 66, 75–76 (Iowa Ct. App. 2009). In *Edwards*, 554 U.S. at 177—78, the court stated:

> We consequently conclude that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky*[2] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

"[T]he *Edwards* decision restricts the right to limit a defendant's right to self-representation to defendants 'who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.'" *Jason*, 779 N.W.2d at 75. We explained in *Jason*, that "[t]he premise underlying the passage is the fairness of the trial." *Id.*

On remand, McCullah argued that the district court should consider post-trial medical evidence. The district court opined, however, the task on remand was to consider whether in light of the *Edwards* case the court would have allowed the defendant to represent himself at trial. Because the post-sentencing medical evidence would not have been available to the trial court, the district court would not consider it. We respectfully disagree.

---

[2] *Dusky v. United States*, 362 U.S. 402, 402 (1960) (stating the test for competency is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him").

Post-trial medical evidence to assist in deciding if a defendant was sufficiently competent to represent himself at trial is not significantly different than permitting a medical expert to testify regarding the defendant's sanity at the time of commission of a criminal act. *See generally State v. Moses*, 320 N.W.2d 581, 587 (Iowa 1982) (citing cases that stand for proposition that expert witnesses are allowed to testify as to sanity of defendant at the time of the offense). In both circumstances, there is an element of "Monday morning quarterbacking." And we are not so much concerned about the unfairness to the trial judge who may be reversed on information that was unavailable to him or her, but rather whether the defendant received a fair trial. *See Jason*, 779 N.W.2d at 75.

Nonetheless, we have reviewed the post-trial medical evidence and find that not much weight should be afforded to Dr. Gallagher's testimony and report. The doctor did not personally interview McCullah. He relied on notes from the Newton Correctional facility that were written one and one-half years after the trial. He only reviewed portions of the transcript identified by McCullah's counsel. There is also no evidence concerning whether McCullah was taking medications for his mental condition, if any. Moreover, Dr. Gallagher did not define the severity of McCullah's mental illness at the time of trial other than to say that whether McCullah could represent himself was a "major question." We also agree with the district court's observation of Dr. Gallagher's report, "it makes no independent specific mental health diagnosis of the defendant and overall, merely restate and begs the question before the court."

As required under *Edwards*, 554 U.S. at 178, the district court considered whether the defendant at the time of trial was suffering from a severe mental

illness to the point where he was not competent to conduct trial proceedings by himself. The district court noted that at the time of trial the defendant had not been diagnosed with a severe mental illness and that

> [u]p until then, the worst that had been said by any health professional about the impact of any mental illness on his ability to stand trial or to represent himself was that his ability to assist counsel was "mildly impaired" and that he displayed "prominent features of Antisocial Personality Disorder, including grandiosity, which causes him to overvalue his ability to represent himself and win his case at trial."

We agree with the district court that an "inflated conception of his own trial skills does not mean [McCullah] was suffering from a severe mental illness."

We also agree with the district court that even accepting that the defendant may have had some delusional beliefs as to the extent of digital recording of events in and around the jail and courthouse, "none of these delusional beliefs made their way into the trial proceedings nor did they affect the defendant's trial performance, or strategy, in any apparent way." Moreover, the courthouse has various cameras and microphones within it that could give rise to surveillance anxieties.

In considering the fairness of the proceedings, we observe that McCullah was appointed stand-by counsel who served to mitigate the dangers of self-representation. Stand-by counsel argued after closing arguments and outside the presence of the jury that the trial court should find McCullah not competent to represent himself. At that time, stand-by counsel did not identify any facts or

circumstances other than a general reference to what occurred during the trial process to support this contention.[3]

In response, the prosecutor resisted and argued:

> In terms of whether he has the present ability to understand the charges against him, he just argued in detail over an hour.
>
> The test is not whether he does that well, the test is not whether he does that effectively, the test is whether he has sufficient understanding to appreciate what's going on in the courtroom.
>
> From the beginning of these proceedings, it's apparent that he knows what his role is. He's acting as his own attorney to try to avoid charges against the prosecution. He clearly understands the Court's role. He's deferred to your authority on some occasions, although on others he defers to you. He understands the role of the witness and his role as defense attorney in cross-examining the witnesses.
>
> At all stages of these proceedings, Defendant may not have represented himself well, he may not have represented himself effectively, that is his risk to take. And he has had two prior competency evaluations prior to the start of this trial by two different psychological professionals, both of whom found the [defendant] met the standard of competency.

Here, McCullah's illness, if any, may have manifested itself during conversations with defense counsel, but his trial performance was quite able at times, and there were no obvious manifestations during the trial itself. Moreover, self representation of a charge of this nature would have been a difficult task for any individual untrained in the law. The trial judge also noted,

> I observed him during these proceedings and he has had the ability to comb through legal arguments, factual arguments, and in explicit detail—excruciatingly explicit detail—to the point wherein he's understood, I believe, the charges, the trial process, and the testimony, the relevance of the evidence.

Although some of the prosecutor's and court's comments related to McCullah's competency to stand trial, they also illuminate upon the issue of

---

[3] We acknowledge however, that he did identify his concerns during the remand hearing.

whether he was competent to represent himself, and support the conclusion reached by the district court.

We decline McCullah's invitation to adopt his proposed test to determine whether a defendant is competent to represent himself.[4] As noted by the State, that question is beyond the scope of the remand. *See State v. O'Shea*, 634 N.W.2d 150, 158 (Iowa Ct. App. 2001) ("When a case is remanded for a limited purpose, the district court's authority extends only to that which is mandated by the appellate court. Any action contrary to or beyond the scope of the mandate is null and void." (citiations omitted)). This case was remanded to determine whether McCullah was competent to represent himself at his criminal trial under *Edwards*. The district court concluded he was. That is the sole question properly on appeal.

Upon our de novo review, we find no reason to disagree with the district court's well-reasoned ruling on remand that McCullah was competent to represent himself at trial under the *Edwards* standard. We therefore affirm.

AFFIRMED.

[4] We note the United States Supreme Court rejected adopting a more definite test. *See Edwards*, 544 U.S. at 178.