NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KA 2187

STATE OF LOUISIANA

VERSUS

MELVIN ALEXANDER, JR.

Judgment Rendered: September 10, 2010

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APPEALED FROM THE TWENTIETH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST FELICIANA
STATE OF LOUISIANA
DOCKET NUMBER 06-CR-585, DIVISION "B"

THE HONORABLE WILLIAM G. CARMICHAEL, JUDGE

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McDONALD, J.

Defendant, Melvin Alexander, Jr., was originally charged by grand jury indictment with two counts of aggravated rape, violations of La. R.S. 14:42. Defendant entered pleas of not guilty to both counts. At a later point in the proceedings, the State amended the bill of indictment to charge defendant with two counts of forcible rape, violations of La. R.S. 14:42.1. Defendant entered pleas of guilty to both counts. After accepting defendant's guilty pleas, the trial court sentenced defendant to serve, on each count, twenty years at hard labor with at least two years to be served without benefit of probation, parole, or suspension of sentence. The trial court ordered these sentences to be served consecutively to each other. Following sentencing, defendant filed a motion to withdraw his guilty pleas, which was denied by the trial court.

Defendant appeals, citing the following as error:

> Did the district court err in accepting [defendant's] guilty plea[s] when it knew from the discovery pleading as well as [d]efense [c]ounsel's arguments that defendant's mental state of mind was an issue that had not been fully explored or resolved?

FACTS

Defendant entered guilty pleas to charges of forcibly raping his two minor stepdaughters, J.M. and J.M.

DISCUSSION

In his sole assignment of error, defendant contends the trial court erred in accepting his guilty pleas, when the issue of defendant's mental state was unresolved.

A defendant does not have an absolute right to the appointment of a sanity commission simply upon request. A trial judge is only required to order a mental examination of a defendant when there are reasonable grounds to doubt the defendant's mental capacity to proceed. La. C.Cr.P. art. 643. It is well established

that "reasonable grounds" exist when one should reasonably doubt the defendant's capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense. To determine a defendant's capacity, we are first guided by La. C.Cr.P. arts 642, 643, and 647. **State ex rel. Seals v. State**, 2000-2738, p. 5 (La. 10/25/02), 831 So.2d 828, 832.

As a general matter, Article 642 allows the defendant's mental incapacity to proceed to be raised at any time by the defense, the district attorney, or the court. The Article additionally requires that when the question of the defendant's mental incapacity to proceed is raised, there shall be no further steps in the criminal prosecution ... until the defendant is found to have the mental capacity to proceed. La. C.Cr.P. art. 642. Next, Article 643, provides, in pertinent part, "The court shall order a mental examination of the defendant when it has reasonable ground to doubt the defendant's mental capacity to proceed." Last, if a defendant's mental incapacity has been properly raised, the proceedings can only continue after the court holds a contradictory hearing and decides the issue of the defendant's mental capacity to proceed. See La. C.Cr.P. art. 647; **State ex rel. Seals**, 2000-2738 at p. 5, 831 So.2d at 832-33.

When there is a *bona fide* question raised regarding a defendant's capacity, the failure to observe procedures to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial. At this point, the failure to resolve the issue of a defendant's capacity to proceed may result in nullification of the conviction and sentence under **State v. Nomey**, 613 So.2d 157, 161-62 (La. 1993), or a *nunc pro tunc* hearing to determine competency retroactively under **State v. Snyder**, 98-1078 (La. 4/14/99), 750 So.2d 832. **State ex rel. Seals**, 2000-2738 at p. 6, 831 So.2d at 833.

In certain instances, a *nunc pro tunc* hearing on the issue of competency is appropriate "if a meaningful inquiry into the defendant's competency" may still be

had. In such cases, the trial court is again vested with the discretion of making this decision as it "is in the best position" to do so. This determination must be decided on a case-by-case basis, under the guidance of **Nomey, Snyder,** and their progeny. The State bears the burden in the *nunc pro tunc* hearing to provide sufficient evidence for the court to make a rational decision. **State ex rel. Seals**, 2000-2738 at pp. 6-7, 831 So.2d at 833.

In the instant case, on May 6, 2008, defendant requested a sanity commission hearing, which was granted by the trial court. On June 19, 2008, defendant filed an Ex Parte Motion for Funds for Neurological Testing. In this motion, defendant argued that although he was represented by retained counsel, he sought funds from the Indigent Defender Board to retain a medical psychologist to test his neurological functioning. In the motion, defense counsel set forth that Dr. Scott Stanley, who conducted a competency evaluation of defendant, believed defendant may have neurological damage. The defense sought funds to have defendant evaluated for the purpose of presenting mitigating evidence necessary to his defense.

The record reflects that defendant was examined by J. Scott Stanley, M.D., and Charles Vosburg, Ph.D., on July 3, 2008, pursuant to the appointment of the Sanity Commission. In a report submitted to the trial court on September 11, 2008, Drs. Stanley and Vosburg concluded that defendant was competent to stand trial; could assist in his own defense; and that defendant could appreciate the rightfulness or wrongfulness of his behavior at the time of the offense. Despite the findings of the sanity commission, the record fails to reflect the trial court ever issued a ruling on defendant's competency to proceed.

The issue of defendant's mental incapacity was properly raised in this matter. Once invoked, a request for a sanity hearing cannot be withdrawn, but the trial court must make an independent assessment of defendant's capacity to

proceed to trial. See **State v. Carr**, 629 So.2d 378 (La. 1993) (per curiam) (wherein the Louisiana Supreme Court granted the defendant's writ application, in part, to remand the case to the district court for the purpose of "entering a formal ruling as to the defendant's competency."); see also **State v. Carr**, 618 So.2d 1098, 1103 (La. App. 1 Cir. 1993) (wherein this Court had previously rejected the defendant's contention that the district court erred in failing to redetermine under the correct standard the defendant's competency because the record showed the defense counsel withdrew the request for sanity hearing).

In the present case, there is no indication in the record that the trial court conducted an independent assessment of defendant's capacity to proceed by holding a contradictory hearing on that issue prior to accepting his guilty pleas. See La. C.Cr.P. art. 647; **State ex rel Seals**, 2000-2738 at p. 5, 831 So.2d at 832-33.

Accordingly, we will remand this matter to the trial court for the purpose of determining whether a *nunc pro tunc* competency hearing may be possible. If the trial court believes that it is still possible to determine the defendant's competency at the time of entering his pleas, the trial court is directed to hold an evidentiary hearing. If the defendant was competent, withdrawal of his guilty pleas will not be allowed. If the defendant is found to have been incompetent at the time of his pleas, he is entitled to withdraw such pleas. Defendant's right to appeal is reserved. See **Synder**, 98-1078 at pp. 31-32 & 43, 750 So.2d at 855-56 & 863; **State v. Mathews**, 2000-2115, p. 17 (La. App. 1 Cir. 9/28/01), 809 So.2d 1002, 1016, writs denied, 2001-2873 (La. 9/13/02), 824 So.2d 1191 & 2001-2907 (La. 10/14/02), 827 So.2d 412.

In light of this issue, we conditionally affirm defendant's convictions, pending resolution of the issue regarding his mental capacity.

This assignment of error has merit.

SENTENCING ERROR

In reviewing this matter for error under La. C.Cr.P. art. 920(2), we have discovered the existence of a sentencing error by the trial court. The trial court shall impose a determinate sentence. La. C.Cr.P. art. 879. The trial court sentenced defendant to a sentence of twenty years at hard labor on each count with "at least" two years to be served without benefit of probation, parole or suspension of sentence. The penalty provision of La. R.S. 14:42.1(B) mandates that at least two years of a sentence for this conviction shall be served without benefit of probation, parole, or suspension of sentence. However, the language used by the district court does not specify exactly how many years of the twenty-year terms that defendant will serve without benefit of probation, parole, or suspension of sentence. Because the sentences cannot be determined, we vacate these sentences.

In the event that defendant is found competent pursuant to the previous remand for the *nunc pro tunc* hearing, the trial court will be required to resentence defendant on these counts.

SENTENCES VACATED; CASE REMANDED FOR *NUNC PRO TUNC* HEARING; CONVICTIONS CONDITIONALLY AFFIRMED.