

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0504

STATE OF LOUISIANA

VERSUS

EDWARD NELSON MCCRAY

Judgment rendered: DEC 22 2010

On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, State of Louisiana
No. 404879; Division: I
The Honorable Reginald T. Badeaux, III, Judge Presiding

WPE
[Signature]
J.P.

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Edward Nelson McCray

BEFORE: KUHN, PETTIGREW AND KLINE, JJ.¹

¹ Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

KLINE, J.

The defendant, Edward Nelson McCray, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1. He pled not guilty and, following a jury trial, was found guilty as charged. He was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating one assignment of error. We conditionally affirm the conviction and sentence and remand for further proceedings.

FACTS

Joseph Pierre, also known as Toby, lived in a trailer on Pierre Cemetery Road in Folsom, St. Tammany Parish. There was a second trailer on the Pierre property next to the trailer in which Toby resided. Toby let his friend Mallery Magee, who also lived in Folsom and temporarily needed a place to live, stay in that second trailer. On the afternoon of August 7, 2005, Toby was cutting the grass when the defendant approached him and asked him for a place to stay. Toby knew the defendant, who was from the Folsom area. Toby told the defendant he could stay one night in Mallery's trailer. The defendant had a red duffle bag with him. That same evening, Toby, Mallery, and the defendant went to Jr. Food Mart to pick up beer. On the way back from the store, they picked up Mary Allen, Toby's friend. Mary had not seen the defendant before, but she knew Mallery.

The four of them went back to Mallery's trailer. They drank beer and some of them smoked crack cocaine, which Mallery provided.² Later, Toby and Mary went next door to Toby's trailer, while Mallery and the defendant remained in Mallery's trailer. About forty-five minutes later, there was a knock at Toby's door. Toby opened the door and he and Mary saw the defendant standing there with a hammer in his hand. Moments later, Toby saw Mallery, completely naked, stagger from his

² It is likely Mallery did not smoke crack cocaine since his autopsy indicated there were no drugs in his system. However, the autopsy revealed Mallery had a .279 BAC level. Mary testified at trial that she did not smoke crack cocaine while everyone was in Mallery's trailer, but she did smoke it when she and Toby went to Toby's trailer.

trailer bleeding profusely from the head. Yelling, Toby asked the defendant what had he done and why did he do it. The defendant told Toby they had a fight. Toby helped Mallery over to a tree and sat him down. Toby and Mary retrieved towels from Toby's trailer to place on Mallery's head. Toby drove the defendant about a mile away and dropped him off. The defendant had his duffel bag. Toby returned and asked a neighbor to call 911. Mallery died from his wounds. The next day, the defendant was arrested in a dilapidated trailer on his father's property in Tangipahoa Parish. The defendant had his red duffel bag with him. Inside the duffel bag was a hammer partially wrapped in a shirt and plastic bag. The defendant had \$680 in cash, all in twenty-dollar denominations.

Dr. Michael Defatta, a forensic pathologist who performed the autopsy on Mallery, testified at trial that Mallery had several large gaping lacerations on his head, as well as abrasions on his chest and back. Some of the lacerations on the head were from a blunt force or crushing effect from an object. One laceration was linear, while another laceration was curvilinear. According to Dr. Defatta, the wounds could have been caused by different surfaces of the same object. In his opinion, that sort of crescent-shaped injury was usually caused from some type of hammer. Further, the side of the hammer may have caused the linear abrasion. Mallery died from a loss of blood.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues that the trial court erred in proceeding to trial without a determination of his mental capacity to proceed to trial. Specifically, the defendant contends that, despite his having filed a motion for mental examination, the trial court did not order a mental examination, did not conduct a contradictory hearing to determine his competency, and made no finding of his competence to stand trial. This assignment of error has merit.

The trial of this matter began in St. Tammany Parish in August 2009. Defense counsel, James Talley, filed a motion for mental examination on August 16, 2007.

The trial judge, William Burris, signed the order for the motion the same day. At a hearing on this matter, Judge Burris learned that the defendant had been found incompetent to stand trial in Washington Parish (also in the 22nd JDC) in an unrelated criminal matter. Judge Burris informed Mr. Talley that he was staying the proceedings until he received the Washington Parish materials and made a ruling. Subsequently, Mr. Talley filed on November 30, 2007, a motion to adopt the sanity proceedings in Washington Parish (State v. McCray, docket no. 04-CR2-91549).

Sometime between January 2008 and January 2009, the defendant's St. Tammany Parish case was transferred to the division of Judge Reginald Badeaux, III. Also around this time, the defendant was being represented by a different defense counsel, Oliver Carriere, II. From January to August 2009, Judge Badeaux ordered that the matter regarding the sanity issue be continued either to a specified day on behalf of the defense or to the day of trial.³ At a hearing on April 21, 2009, the prosecutor, Julie Knight, informed Judge Badeaux that the defendant had been found incompetent on November 22, 2006, in the Washington Parish case, which had been resolved. According to Ms. Knight, on February 13, 2008, the defendant "was reviewed after a ninety day stint and found to be faking and competent." Ms. Knight marked medical records from Washington Parish as exhibits M1 and M2, and submitted them into evidence. There was no response from Judge Badeaux at this hearing. When the trial began on August 11, 2009, Judge Badeaux had still made no ruling regarding the status of the defendant's competency to stand trial.

Exhibit M1 is the November 22, 2006, Washington Parish Sanity Commission Report by Dr. Michelle Garriga. After examining the defendant, Dr. Garriga noted in her summary of competence to stand trial:

It is my opinion that Mr. McCray can not [sic] currently relate to his attorney with a reasonable degree of rational understanding, nor does he have a rational as well as factual understanding of the proceedings against him. He does not meet the Bennett Criteria for competency to

³ Seven times, from January 29, 2009, to August 4, 2009, the minutes contain language stating this "matter being on assignment for Lunacy Status. Court ordered this matter be continued[.]"

stand trial as outlined in the case of *La. V. Bennett*. (1977) His score on the Georgia Court Competency Test was 80.

Exhibit M2 is a medical evaluation of the defendant from the Department of Health and Hospitals dated February 13, 2008. The defendant was evaluated by Dr. David Hale, a psychologist, and Dr. Harminder Mallik, a psychiatrist. Upon determining the defendant was exaggerating and malingering his symptomatology, the doctors concluded in pertinent part:

Based on our assessment over the course of the past four months, Mr. McCray does not present with any underlying psychiatric disorders that would preclude his ability to assist counsel in his own defense. Mr. McCray has a choice whether he wants to cooperate or whether he does not.

Under the "OPINIONS REGARDING COMPETENCY" heading, the doctors selected the option which stated: "The defendant currently has a rational as well as a factual understanding of the proceedings against him/her and has a sufficient present ability to consult with his/her lawyer with a reasonable degree of rational understanding."

In his brief, the defendant asserts it was error for the trial to have taken place and his conviction should be reversed because the trial court never found him competent to stand trial at any time. There is nothing in the record before us that indicates Judge Badeaux made any ruling regarding the defendant's competency.

Louisiana Code of Criminal Procedure article 642 provides:

The defendant's mental incapacity to proceed may be raised at any time by the defense, the district attorney, or the court. When the question of the defendant's mental incapacity to proceed is raised, there shall be no further steps in the criminal prosecution, except the institution of prosecution, until the defendant is found to have the mental capacity to proceed.

The issue of a defendant's mental capacity to proceed shall be determined by the court in a contradictory hearing. La. Code Crim. P. art. 647. The issue of present insanity or mental incapacity to proceed may be raised at any stage of the proceedings, even after conviction. **State v. Henson**, 351 So.2d 1169, 1173 (La. 1977).

It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subject to trial. The failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process rights as set forth in articles 642 and 647. Our statutory scheme for detecting mental incapacity jealously guards a defendant's right to a fair trial. See State v. Nomey, 613 So.2d 157, 159-61 (La. 1993). See also State v. Carr, 629 So.2d 378 (La. 1993) (per curiam); State v. Harris, 406 So.2d 128, 129-30 (La. 1981); State v. Mathews, 2000-2115, pp. 14-17 (La. App. 1st Cir. 9/28/01), 809 So.2d 1002, 1014-16, writs denied, 2001-2873 (La. 9/13/02), 824 So.2d 1191, 2001-2907 (La. 10/14/02), 827 So.2d 412.

In the instant matter, the defendant's mental capacity to proceed was clearly an issue before the court for two years prior to the start of trial. If Judge Badeaux adopted the findings of Drs. Hale and Mallik, it is not clear from the record. The State argues in its brief that, since the defendant filed a motion to adopt the result of the sanity proceedings in Washington Parish, Judge Badeaux did not err in proceeding to trial since the defendant was subsequently found to be competent by Drs. Hale and Mallik. The State's argument has little merit because the defendant's motion to adopt sanity proceedings was filed November 30, 2007, whereas the competency evaluation and report by Drs. Hale and Mallik was generated on February 13, 2008. Accordingly, since this 2008 report was not extant when the defendant filed his 2007 motion, it is clear the defendant sought to adopt only the findings of the November 22, 2006 Sanity Commission Report, which found the defendant incompetent to stand trial. In any event, whether or not Judge Badeaux adopted the findings of Drs. Hale and Mallik, there has been no formal ruling issued in the instant matter regarding the defendant's mental capacity to proceed. However, contrary to the defendant's suggestion that his conviction be reversed, we find it

unnecessary to set aside the conviction and sentence as the issue of capacity may be clarified on remand. See State v. Snyder, 98-1078, pp. 31-32 (La. 4/14/99), 750 So.2d 832, 855-56.

The defendant has already been evaluated by three doctors to determine competency, and two reports have been made a part of the record. As such, we remand for a *nunc pro tunc* hearing on the issue of competency if a meaningful inquiry into the defendant's competency can still be had. See State v. Snyder, 98-1078 at pp. 29-32, 750 So.2d at 854-55; Mathews, 2000-2115 at p. 17, 809 So.2d at 1016. The trial court is in the best position to determine whether it can make a retrospective determination of defendant's competency during his trial and sentencing. The determination of whether a trial court can hold a meaningful retrospective competency hearing is necessarily decided on a case-by-case basis. The State bears the burden to show the court that the tools of rational decision are available. Snyder, 98-1078 at pp. 30-31, 750 So.2d at 855.

A "meaningful" determination is possible "where the state of the record, together with such additional evidence as may be relevant and available, permits an accurate assessment of the defendant's condition at the time of the original state proceedings." Additionally, "[w]hen determining whether a meaningful hearing may be held, we look to the existence of contemporaneous medical evidence, the recollections of non-experts who had the opportunity to interact with the defendant during the relevant period, statements by the defendant in the trial transcript, and the existence of medical records. The passage of time is not an insurmountable obstacle if sufficient contemporaneous information is available." Snyder, 98-1078 at p. 31, 750 So.2d at 855 (quoting Reynolds v. Norris, 86 F.3d 796, 802-03 (8th Cir. 1996)).

Because a *nunc pro tunc* competency hearing may be possible to rectify the trial court's error in failing to make further inquiry into defendant's competency prior to trial, we remand the case to the trial court for the sole purpose of determining whether such a hearing is now possible and, if so, to conduct such an evidentiary

hearing. If the trial court concludes the defendant was competent, no new trial is required to be conducted. If the trial court finds a meaningful inquiry cannot be had, or if it determines after the hearing that the defendant was not competent at the time of his trial, the defendant shall be entitled to a new trial. See Snyder, 98-1078 at pp. 31-32, 750 So.2d at 855-56.

Accordingly, the conviction and sentence are conditionally affirmed. The case is remanded to the district court for a determination of whether a meaningful inquiry into defendant's competence at the time of trial is now possible and, if so, for an evidentiary hearing and determination on this issue. See Snyder, 98-1078 at p. 43, 750 So.2d at 863.

DECREE

For the forementioned reasons, we conditionally affirm the conviction and sentence. We remand for determination of whether a meaningful inquiry into the defendant's competence at the time of trial is possible. If so, we ask for an evidentiary hearing and determination on this issue.

**CONVICTION AND SENTENCE CONDITIONALLY AFFIRMED;
REMANDED FOR DETERMINATION OF WHETHER A MEANINGFUL
INQUIRY INTO DEFENDANT'S COMPETENCE AT THE TIME OF TRIAL
IS POSSIBLE AND, IF SO, FOR AN EVIDENTIARY HEARING AND
DETERMINATION ON THIS ISSUE**