COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

GRAHAM HEATH BROOKINS,	§	No. 08-16-00151-CR
Appellant,	§	Appeal from
v.	§	371st District Court
THE STATE OF TEXAS,	§	of Tarrant County, Texas
Appellee.	§	(TC # 1301178D)

O P I N I O N

Graham Heath Brookins challenges his conviction for burglary of a habitation. He was initially placed on community supervision under a deferred adjudication plea. After failing to appear before his probation officer for several months, the State filed a petition to adjudicate his guilt. Appellant faults the trial judge for not *sua sponte* making an informal inquiry into his competence at the hearing to adjudicate his guilt. Finding no abuse of discretion by the trial court, we affirm.

FACTUAL SUMMARY[1]

The State charged Appellant in 2012 with burglary of a habitation, criminal mischief, and evading arrest. From the arraignment paperwork, Appellant appeared "confused". He did not know his address or why he was in jail, and said he did not want a lawyer. During intake at the jail, he refused to answer most of the questions asked of him. The trial court quickly ordered a competency evaluation.

In a report dated November 14, 2012, the appointed psychologist, Dr. Jim Womack, concluded that Appellant did not presently have a rational and factual understanding of the proceedings against him, and was incompetent to stand trial. The report noted that Appellant refused to cooperate in two examinations. In the second exam, for instance, he refused to sit down; he answered questions with questions; and often interrupted Dr. Womack. Appellant was not on any medications at the time.

The State did not contest Dr. Womack's assessment, and the trial court on November 15, 2012, committed Appellant to North Texas State Hospital. Following a period of observation and treatment, the facility in April of 2013 concluded that Appellant regained the competency to stand trial. Following counseling and psychotropic medications, he met each of the criteria that mental health facilities are charged with considering in competency evaluations, including: (1) a rationale understanding of the charges and potential consequences if convicted; (2) an ability to disclose pertinent facts, events, and states of mind; (3) an ability to engage in a reasoned choice of legal strategies and options; (4) an understanding of the adversarial nature of criminal proceedings; (5)

[1] This case was transferred from our sister court in Fort Worth pursuant to the Texas Supreme Court's docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013). We follow the precedents of the Fort Worth Court to the extent they might conflict with our own. *See* TEX.R.APP.P. 41.3.

exhibiting appropriate courtroom behavior; and (6) having the capacity to testify. TEX.CODE CRIM.PROC.ANN. art. 46B.024(1)(A)-(F)(West Supp. 2016).

The trial court then found Appellant mentally competent. On April 17, 2013, he entered a guilty plea on the burglary of a habitation charge, but the finding of guilt was deferred while he was placed on community supervision for five years. In addition to the standard terms for community supervision, Appellant was ordered to submit to psychiatric or psychological evaluations as directed, take all medications as prescribed, and he was placed on the local Mental Health/Mental Retardation authorities' caseload.

On December 15, 2015, the State moved to proceed with adjudication of guilt. The State's petition claimed that Appellant failed to report to his supervising officer in August, October, November, and December of 2015. After he was arrested, the trial court entered an order on January 19, 2016 for a competency examination. The appointed defense counsel observed that Appellant was "completely unable to communicate."

As with his previous competency examination, the psychologist, Dr. Emily Fallis, was unable to meaningfully interview Appellant "because of his odd and unresponsive behavior." He refused to answer many questions. To other questions, he repeatedly exclaimed, "I'm sure they'll be glad to expand on that." Dr. Fallis noted evidence of psychosis (detachment from reality) such as when Appellant stated that poison was coming from the walls and floors of his jail cell. She concluded that Appellant lacked each of the Article 46B.024(1)(A)-(F) criteria.

The court entered an agreed judgment on February 5, 2016, again committing Appellant to a mental health facility for up to 120 days for assessment and treatment. That facility later referred Appellant back to the trial court with a recommendation that he was now competent to stand trial. The actual assessment and any details of that commitment are not included in the record. On April

22, 2016, the court entered a judgment of mental competency. Other than the judgment itself, none of the proceedings attendant to that decision are included in the record on appeal.

The trial court adjudicated Appellant guilty on May 13, 2016, and sentenced him to three years in the State jail, giving credit for the ten months previously served. Appellant signed a waiver of the right to file a notice of appeal. His appointed trial counsel acknowledged that he reviewed the judgment and sentence with Appellant, and advised him of his right to appeal. The trial attorney affirmed, "I believe that he understood all of his rights and any potential issues on appeal, and that his decision not to file notice of appeal, and to waive his right to appeal was made voluntarily, knowingly, and intelligently." Several weeks later, however, Appellant filed a handwritten, *pro se* notice of appeal. New counsel was appointed and this appeal follows. Appellant raises one issue for review, contending that the trial court erred in not ordering an additional evaluation of his competency at the guilt adjudication proceeding.

CONTROLLING LAW

A defendant must be competent to stand trial. *Ex parte Hagans* 558 S.W.2d 457, 460-61 (Tex.Crim.App. 1977). This requirement extends to adjudication hearings. *Durgan v. State,* 240 S.W.3d 875, 878 (Tex.Crim.App. 2007). The requirement is of constitutional dimension, and is required by the Due Process Clause of the United States Constitution. *Drope v. Missouri*, 420 U.S. 162, 172, 95 S.Ct. 896, 904, 43 L.Ed.2d 103 (1975); *Morris v. State*, 301 S.W.3d 281, 299 (Tex.Crim.App. 2009). Accordingly, each state must implement procedures to account for a defendant's competency. *See Pate v. Robinson*, 383 U.S. 375,385, 86 S.Ct. 836, 842, 15 L.Ed.2d 815 (1966). Texas has a comprehensive scheme for incompetency proceedings found in TEX.CODE CRIM.PROC.ANN. art. 46B.001 et. seq. (West 2006 and West Supp. 2016).

Under Article 46B, a person is incompetent to stand trial if the person does not have "(1) sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings against the person." *Id.* at art. 46B.003(a). "A defendant is presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence." *Id*. at art. 46B.003(b).

The statutory procedure for initiating a competency inquiry involves something of a Texas two-step. First, any "suggestion" of incompetency to stand trial calls for an "informal inquiry" to determine whether evidence exists to justify a formal competency trial. *Id*. at art. 46B.004(c)("On suggestion that the defendant may be incompetent to stand trial, the court shall determine by informal inquiry whether there is some evidence from any source that would support a finding that the defendant may be incompetent to stand trial."). This "suggestion of incompetency," may "consist solely of a representation from any credible source that the defendant may be incompetent." *Id.* at art.46B.004(c-1). A further evidentiary showing is not required to initiate the inquiry, and the court is not required to have a bona fide doubt about the competency of the defendant. *Id.*[2] "Evidence suggesting the need for an informal inquiry may be based on observations made in relation to one or more of the factors described by Article 46B.024 or on any other indication that the defendant is incompetent within the meaning of Article 46B.003." *Id.*[3]

[2] A 2011 statutory addition negated the existing case law requirement that the trial court must have a "bona fide doubt" as to the defendant's competency to stand trial before proceeding further with a competency evaluation. *See Fuller v. State*, 253 S.W.3d 220, 227-28 (Tex.Crim.App. 2008)(noting prior "bona fide doubt" standard); *Turner v. State*, 422 S.W.3d 676, 691-92 (Tex.Crim.App. 2013)(noting effect of statutory change).

[3] These factors include the capacity of the defendant to (a) rationally understand the charges against him and the potential consequences of the pending criminal proceedings; (b) disclose to counsel pertinent facts, events, and states of mind; (c) engage in a reasoned choice of legal strategies and options; (d) understand the adversarial nature of criminal proceedings; (e) exhibit appropriate courtroom behavior; and (f) testify. *Id.* art.46B.024(1)(A-F).

An informal inquiry does not have to be exhaustive. It may be satisfied when the trial court poses simple questions to the defendant or defense counsel regarding the defendant's competency. *See generally Luna v. State*, 268 S.W.3d 594, 598-600 (Tex.Crim.App. 2008), *cert. denied*, 558 U.S. 833 (2009); *Jackson v. State*, 391 S.W.3d 139, 142 (Tex.App.--Texarkana 2012, no pet.); *Gray v. State*, 257 S.W.3d 825, 829 (Tex.App.--Texarkana 2008, pet. ref'd). In making its informal inquiry, the trial court is not required to follow any specific protocol. *Teal v. State*, No. 01-10-00506-CR, 2011 WL 6140676, at *2 (Tex.App.--Houston [1st Dist.] Dec. 8, 2011, pet. ref'd)(mem. op.)(not designated for publication)("As its name suggests, an 'informal inquiry' does not have specific formal requirements.").

If the informal inquiry establishes there is evidence that would support a rational finding of fact that the accused is incompetent to stand trial, the trial court should then stay all other proceedings in the case, and move to the second step of ordering a competency evaluation. TEX.CODE CRIM.PROC.ANN. art. 46B.004(d) and art. 46B.005(a)(outlining predicate steps for conducting a formal competency trial); *see also Turner v. State*, 422 S.W.3d 676, 696 (Tex.Crim.App. 2013); *Gipson v. State*, 02-14-00349-CR, 2016 WL 279358, at *7 (Tex.App.--Fort Worth Jan. 14, 2016, pet. ref'd)(not designated for publication).

STANDARD OF REVIEW

We review a trial court's decision regarding an informal competency inquiry for an abuse of discretion. *See Montoya v. State*, 291 S.W.3d 420, 426 (Tex.Crim.App. 2009), *superseded on other grounds by statute as recognized in Turner v. State*, 422 S.W.3d 676, 692, n.31 (Tex.Crim.App. 2013); *Tadlock v. State*, 484 S.W.3d 560, 570 (Tex.App.--Texarkana 2016, no pet.); *Gipson*, 2016 WL 279358, at *6 ("We review issues involving competency determinations

for an abuse of discretion."); *Ashley v. State*, 404 S.W.3d 672, 678 (Tex.App.--El Paso 2013, no pet.).

A trial court abuses its discretion if its decision is arbitrary or unreasonable. *Montoya,* 291 S.W.3d at 426. A reviewing court does not substitute its judgment for that of the trial court. *Id.* A trial court's first-hand factual assessment of a defendant's competency is entitled to great deference on appeal. *Ross v. State*, 133 S.W.3d 618, 627 (Tex.Crim.App. 2004).

APPPLICATION

Appellant's argument centers on the proceeding to adjudicate guilt. After recounting the history of his mental illness, Appellant argues that he engaged in conduct that raised questions as to his competency. We come to the exact opposite conclusion, but in any event, the conduct of the hearing demonstrates no abuse of discretion.

At the outset of the hearing, the trial court admonished Appellant of the allegations in each of the petitions to adjudicate his guilty.[4] Appellant acknowledged his previous guilty plea and community supervision. He acknowledged that he understood the allegations, and then pled true to each. He stated that he also understood the possible sentence that could be imposed.

Appellant then testified. His counsel's questions were soon supplanted by a twelve-page question and answer segment conducted by the trial court. Appellant explained that in the Fall of 2015 he ran out of gas while driving in McKinney. He was a "little paranoid" at that time, and would not open the car door for the police. They broke into the car, and took Appellant to a Baylor mental health facility. The discussion then turned to Appellant's perception of his mental illness. While he was on community supervision, he saw mental health providers at John Peter Smith Hospital (JPS). He contends that testing done there -- including Rorschach and MMPI tests --

[4] The State also moved to adjudicate guilt on the evading arrest and criminal mischief charge. Appellant has not challenged the trial court's sentence in those cases.

demonstrated that he suffers from depression and not schizophrenia. This belief colored Appellant's desire to take medications. He believed the providers at JPS prescribed Celexa, an anti-depressant medication, on as-needed basis. When he was taken to Baylor, however, the providers believed he was schizophrenic, and forced injections of several antipsychotic medications. He testified that he was taking Haldol at the time of the hearing to adjudicate guilt. Haldol is anti-psychotic medication used to treat schizophrenia. *See* Douglas Mossman, Unbuckling the "Chemical Straitjacket": The Legal Significance of Recent Advances in the Pharmacological Treatment of Psychosis, 39 S.D. L. Rev. 1033, 1063 n.154 (2002).

The thrust of Appellant's argument is that his adamant belief that he was not schizophrenic should have alerted the trial court to a possible competency concern. We disagree for several reasons. First, the question is not whether Appellant has a mental illness, or what mental illness he may have, but whether he is unable to assist his counsel and has a rationale understanding of the proceedings facing him. *Turner*, 422 S.W.3d at 691. Even if he misperceived his correct psychiatric diagnosis, it does not necessarily follow that he would misperceive the nature of the legal proceedings, or that he could not assist his counsel. If anything, the extended discourse between Appellant and the trial court demonstrates that Appellant is sufficiently articulate to recount events and medical jargon.

Second, the record actually supports Appellant's view that there was a disagreement about his diagnosis. The assessment by Dr. Fallis contains a summary review of past medical records. Those records recount how Appellant had been diagnosed with schizophrenia, paranoid type, and later in 2013, with a major depressive episode. But other medical records in an October 2014 note that he had no significant symptoms of psychosis and the provider was unsure why Appellant had been given this diagnosis in the past. Testing "reportedly ruled out Schizophrenia and Bipolar

Disorder but confirmed depression and 'mild paranoia.'" This summary of the records is actually consistent with what Appellant explained at the hearing.

The same record from Dr. Fallis support the fact that Appellant is non-compliant with taking his medication. As his mother testified at the hearing, when he was on his medication, he was thriving and functioning. And Appellant testified that he was taking his Haldol at the time of the hearing. The cause of Appellant's psychosis -- not taking his medication -- was simply not an issue at the time of the hearing. The trial court had before it the two prior assessments concluding that Appellant was not competent. In each, Appellant was *not taking* his medication and he refused to cooperate with the psychologist. By contrast, at the adjudication hearing, while he *was taking* his medication, he was responsive to the court's questions, and had a fair understanding of past events.

Although not a prerequisite for triggering an informal inquiry, Appellant did not demonstrate any bizarre behavior at the hearing that is a hallmark for many cases arising under Article 46B. *Cf. e.g.*, *Ashley*, 404 S.W.3d at 672, 678 (defendant refused to put on his clothes and could not appear in court, and when he did, he blurted out statements in front of the jury). And unlike other prior cases, Appellant's trial counsel never raised a competency concern at of the time of the hearing. *Cf. e.g. Turner*, 422 S.W.3d at 680-87(multiple and consistent claims by defense counsel that the defendant could not assist in his defense); *Casey v. State*, 924 S.W.2d 946, 949 (Tex.Crim.App. 1996)(noting importance of defense counsel's claim of incompetence). Nor is there any indication that Appellant is not intellectually capable of understanding the nature of the proceedings. To the contrary, the record shows he is a self-taught computer programmer whose prior employer wrote a letter on his behalf. We simply find no basis to conclude that the trial court abused its discretion in not making an informal inquiry into Appellant's competence at the

adjudication hearing. Accordingly, we need not proceed the next (and perhaps more difficult) question of whether any failure to make an informal inquiry was harmful error (i.e. that an informal inquiry would have led to a formal inquiry and what that formal inquiry might have shown). We accordingly overrule issue one and affirm the judgment of conviction below.

May 16, 2017

ANN CRAWFORD McCLURE, Chief Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J., not participating

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