REL: May 6, 2022

Alabama Court of Criminal Appeals

OCTOBER TERM, 2021-2022

CR-20-0989

State of Alabama

v.

James Brooks Glass, Jr.

Appeal from Clarke Circuit Court
(CC-15-348.60)

WINDOM, Presiding Judge.

This is an appeal by the State of Alabama from an order of the circuit court granting postconviction relief to James Brooks Glass, Jr. pursuant to Rule 32, Ala. R. Crim. P. Glass's Rule 32 petition attacked his April 2016 guilty-plea conviction for electronic solicitation of a child,

see § 13A-6-122, Ala. Code 1975, and his resulting sentence of 10 years in prison, which was split to time served followed by 5 years of probation. No direct appeal was taken.

On July 27, 2020, Glass filed a Rule 32 petition, his first. Glass asserted in the petition that the trial court lacked jurisdiction to render judgment or to impose sentence because, he said, he was incompetent at the time he entered his guilty plea. Glass noted that the trial court, following Glass's indictment, ordered a forensic evaluation of Glass, which was completed by Dr. Doug McKeown. Dr. McKeown reported that he had concerns about Glass's ability to assist his counsel and that further investigation would be needed to render an opinion on Glass's competence. The trial court then ordered a neuropsychological evaluation, to be conducted by Dr. Randall Griffith. Dr. Griffith found that Glass had difficulties with mental-health processes, acumen, and memory, but nonetheless determined that Glass was competent to stand trial.

The State filed a response to Glass's petition two days after the petition was filed, asserting that Glass's claim was without merit; that, to the extent Glass was raising a procedural due-process claim, his

claim was precluded by Rule 32.2(c), Ala. R. Crim. P.; and that, to the extent Glass was raising a substantive due-process claim, his claim was precluded by Rule 32.2(a)(2), Ala. R. Crim. P.

On August 31, 2020, Glass filed a supplement to his petition, which included an allegation that he had recently been diagnosed with Niemann-Pick disease type C ("NPC") by Dr. Ricardo Roda, a professor of neurology with Johns Hopkins Medicine. The supplement pleaded that NPC is a progressive genetic disorder that often causes cognitive impairment and could result in dementia. The supplement stated that NPC can manifest at any age but that it was believed Glass's condition first presented itself when he was a juvenile. Glass attached to his supplement a letter from his treating physician and two reports containing the results of genetic testing.

The circuit court conducted a hearing on Glass's petition on August 2, 2021.[1] The lone witness at the hearing was Melissa Renee McMillan-Cox, Glass's mother, who testified about Glass's history of mental and physical complications.

[1]The same circuit judge who accepted Glass's guilty plea presided over Glass's Rule 32 proceeding.

On August 24, 2021, the circuit court issued an order granting Glass relief, stating that it had relied on McMillan-Cox's testimony as well as the mental evaluations conducted before the trial court accepted Glass's guilty plea and the attachments to Glass's supplement to his petition. The State filed a timely appeal.

On appeal, the State argues that the circuit court erred in granting postconviction relief to Glass. Specifically, the State asserts that there was no evidence presented that Glass was incompetent at the he pleaded guilty.[2] This Court agrees.

Glass was afforded an opportunity to prove his claim at an evidentiary hearing.

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[2]In Ferguson v. State, 13 So. 3d 418, 443-44 (Ala. Crim. App. 2008), this Court held that a claim that Ferguson was incompetent at the time of trial was procedurally barred by Rule 32.2(a)(2), Ala. R. Crim. P., because the issue of Ferguson's competency was specifically raised and addressed at trial. Compare Rules 32.2(a)(2) and 32.2(a)(4), Ala. R. Crim. P., with Rules 32.2(a)(3) and 32.2(a)(5), Ala. R. Crim. P. (Rules 32.2(a)(3) and 32.2(a)(5) may not be applied to jurisdictional claims arising under Rule 32.1(b), Ala. R. Crim. P., whereas Rules 32.2(a)(2) and 32(a)(4) contain no such limitation.). As in Ferguson, Glass's competence was specifically assessed by the trial court, and the trial court determined that Glass was competent to proceed. And while the State did raise Rule 32.2(a)(2) as a procedural bar in its response to Glass's petition, the State has failed to reassert this argument on appeal. Therefore, this argument is deemed abandoned. See Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995).

> "When the circuit court conducts an evidentiary hearing, '[t]he burden of proof in a Rule 32 proceeding rests solely with the petitioner, not the State.' Davis v. State, 9 So. 3d 514, 519 (Ala. Crim. App. 2006), rev'd on other grounds, 9 So. 3d 537 (Ala. 2007). '[I]n a Rule 32, Ala. R. Crim. P., proceeding, the burden of proof is upon the petitioner seeking post-conviction relief to establish his grounds for relief by a preponderance of the evidence.' Wilson v. State, 644 So. 2d 1326, 1328 (Ala. Crim. App. 1994). Rule 32.3, Ala. R. Crim. P., specifically provides that '[t]he petitioner shall have the burden of ... proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.' '[W]hen the facts are undisputed and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo.' Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). 'However, where there are disputed facts in a postconviction proceeding and the circuit court resolves those disputed facts, "[t]he standard of review on appeal ... is whether the trial judge abused his discretion when he denied the petition."' Boyd v. State, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003) (quoting Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992))."

Marshall v. State, 182 So.3d 573, 581 (Ala. Crim. App. 2014). Here, there are no disputed facts. The State challenges only the circuit court's application of the law to the facts. Consequently, this Court will review the circuit court's ruling de novo, with no presumption of correctness. Id.

Glass claimed in his petition that he was incompetent at the time he entered his guilty plea.

> "'Due process requires that an accused be legally competent to plead guilty. Chavez v. United States, 641 F.2d 1253, 1255-56 (9th Cir. 1981). The plea must be voluntary and intelligent. Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711, 23 L. Ed. 2d 274 (1969). "Courts generally have held that the standard of competence to stand trial parallels the standard of competence to plead guilty." Twelfth Annual Review of Criminal Procedure, 71 Geo. L.J. 339, 540, n.1348 (1982). See also Annot. 31 A.L.R. Fed. 375 (1977). That test is whether the accused 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." Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960).'
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> "Eathorne v. State, 448 So. 2d 445, 448 (Ala. Crim. App. 1984). Thus, the same guidelines or standard applies to determining competency to stand trial as does to determining competence to plead guilty."

Roberts v. State, 62 So. 3d 1071, 1076 (Ala. Crim. App. 2010). Glass's claim is a substantive due-process claim, and it implicates the jurisdiction of the trial court. See Nicks v. State, 783 So. 2d 895, 908 (Ala. Crim. App. 1999). Importantly, there is no presumption of incompetency. Id. (quoting Medina v. Singletary, 59 F.3d 1095, 1106 (11th Cir. 1995)). As the petitioner, Glass bore the burden to prove by a preponderance of the evidence that, at the time he pleaded guilty, he

lacked the ability to assist in his defense by consulting with counsel with a reasonable degree of rational understanding of the facts and the legal proceedings against him. Rules 32.3 and 11.1, Ala. R. Crim. P.

The circuit court stated in its order granting relief that it had relied on three specific sources of evidence: McMillan-Cox's testimony, the mental evaluations that had been conducted by Dr. McKeown and Dr. Griffith, and the attachments to Glass's petition. These sources will be addressed in turn.

First, the circuit court relied in part on the testimony of McMillan-Cox. But, even accepting all of her testimony as true, she failed to offer any new evidence that would shed light on the issue before the circuit court: whether Glass, at the time he pleaded guilty, was competent. Postconviction counsel attempted to elicit such evidence, as McMillan-Cox was specifically asked several times to provide testimony relevant to Glass's claim. Her answers to these questions are set out here in full:

> "Q: All right. And, [McMillan-Cox], dating back – it's been about five or so years or six or seven years since the incident, but the plea has been a little over five years, can you tell the Court, can you tell His Honor maybe what [Glass's] mental state, how he acted, his speech, his memory was at these stages of his life?

"A: Okay. Well, he had a normal birth. He was slow at speaking and Niemann-Pick affects your speech, your eye movements, it causes brain atrophy generally of the cerebellum, but his is the entire brain. It affects your gait, your swallowing. His hands are beginning to become clubbed, so it affects your muscular atrophy.

"He's mainly on one side, which is a little bit better, but there's where it's kind of at. So I noticed through the years from the time he was little. He was a little slow speaking, a little slow walking, but I didn't think anything about it at that time. And then at age six, when he was in the first grade, he started severely stuttering, and I had him in speech therapy from six to twelve and there was nothing that they could do. They didn't know what to do at that point.

"And so over the years, I know when he was in high school, he struggled academically. He passed but it was a struggle the whole time. So he's had tutors, he's been to psychologists to try to get through any of the difficulties that he had, but we still were not able to pinpoint it. We know something was wrong but couldn't pinpoint it.

"And then when he got into adolescence when he was 16, I noticed the hands. He didn't have control over his little finger or his middle finger. They got real stiff. Also, this is when I noticed the gait issue as it was slowly but surely getting worse until where he is now.

"And then, the memory thing started. He was out of high school and he couldn't seem to focus on any one thing. He was working, and finally got fired from Target [retail store] because he left the keys in the back door three times. I can't tell you how many times he left his keys in his car the same day, locked them and had to get somebody. So it's as if he didn't remember things, and it was this way with school.

"Q: So around, like I said, five, six, seven years ago, how would you describe his functioning as far as – I know we've gone back as far as high school, and – but how would you describe his memory, his ability to understand?

"A: Well, in 2012, he came to visit me in Annapolis. At that point in time, I knew there was something because of my education background and understanding the body and the way the body moves. I could see that he was having a gait – severe gait issue. He was slower, leaning to one side. And at that point in time, I told him to go to a neurologist and he did, but they still really couldn't find anything but they didn't do the extensive testing either.

"And so then, he started having his seizures in 2013. And even prior to having this severe seizure in church, he had talked to me several times about the fact that he woke up on the floor. So that told me he was having seizures long before he was actually diagnosed with the seizures.

"So as time has gone on, it's progressively gotten worse and worse. He's now with a walker. I'm getting ready to order a wheelchair for him because if we go and do any kind of entertainment outside, he can't walk. So we have – we'll have to put him in a wheelchair and start pushing him around.

"….

"Q: And during the time frame of this, which was about, like I said, seven years around the offense time up until about five years when the plea was taken, you had contacted [Glass] and you were around him – and we can see him now, but he was having severe mental difficulties at that point, was he not?

"A: He was."

(R. 11-14, 24.) Although given the opportunity to testify about Glass's mental state at the time he pleaded guilty, McMillan-Cox instead testified about Glass's being able to work at a retail store – apparently being entrusted with keys to the store – and to graduate from high school, and she gave a general overview of Glass's symptoms, particularly his physical symptoms, over the course of his life.[3] The relevant time period was in 2016, yet McMillan-Cox's testimony appears to have concerned every other time period in Glass's life, both before and after his guilty plea. The only testimony that touches on Glass's mental state at the time of his guilty plea was McMillan-Cox's agreeing with postconviction counsel that Glass was suffering from "severe mental difficulties" at that time. However, such nonspecific testimony says nothing about Glass's ability to assist in his defense or to his having a reasonable degree of rational understanding of the facts and legal proceedings against him. "[T]he law is clear that [p]roof of the incompetency of an accused to stand trial involves more than simply showing that the accused has mental problems or psychological

[3]McMillan-Cox testified that Glass had been fired from a Target retail department store in 2013; Glass was quick to correct his mother, telling her he had been fired in 2010. (R. 17.)

difficulties." Connally v. State, 33 So. 3d 618, 621-22 (Ala. Crim. App. 2007) (quotations omitted).

The quoted portions of McMillan-Cox's testimony do not provide evidence upon which a finding of incompetence could be based, and the remainder of her testimony comes no closer to providing evidence of Glass's mental state at the time he pleaded guilty.

Next, the circuit court relied in part on the evaluations of Glass conducted before Glass pleaded guilty. Dr. McKeown, who evaluated Glass in September 2014, found that, from an intellectual standpoint, Glass "does have a number of basic skills but is considered to have some deterioration or impact on his intellectual functioning which appears to be currently only in the low-average range of intellectual function." (Supp. C. 8.) Dr. McKeown noted that Glass's speech was understandable and coherent but that he did suffer from a significant stutter at times. Dr. McKeown concluded his clinical assessment by stating:

> "Overall, [Glass] demonstrates some significant difficulties with movement and variable emotional responses that do not appear to have a specific basis other than a report that these have been issues that have been occurring since he had his seizure in church. No medical information is available and the suggestion of possible impediments that

> would be associated with some organic or other neurological distress are indicated."

(Supp. C. 9.) Dr. McKeown opined that Glass likely suffered from a yet-to-be-determined neurological issue. Turning to whether Glass was competent to stand trial, Dr. McKeown found that Glass had a general but concrete understanding and appreciation of the charges against him with some ability to appreciate the possible penalties associated with a conviction. Also, Glass demonstrated an understanding of the roles of the judge, the district attorney, and defense counsel, as well as a reasonable ability to understand and appreciate court procedure and the need to rely on defense counsel. Additionally, Dr. McKeown found that Glass appeared to understand his available legal defenses and was knowledgeable about the consequences of his available pleas.

Nonetheless, Dr. McKeown was hesitant to render an opinion on Glass's competence. Dr. McKeown was concerned about Glass's ability to communicate effectively with defense counsel and Glass's apparent neurological disorder. Dr. McKeown stated that "[f]urther evaluation from a neurological standpoint is considered necessary before an opinion can be completed." (Supp. C. 11.)

Dr. Griffith, a clinical neuropsychologist, was tasked by the trial court with providing that evaluation, which he conducted in December 2015. Dr. Griffith placed Glass's overall intellectual functioning in the borderline range and found his overall memory performance to be impaired. Like Dr. McKeown, Dr. Griffith believed Glass's profile was consistent with an unspecified neurocognitive disorder. Even so, Dr. Griffith's opinion was that Glass was competent to stand trial:

> "Mr. Glass does not appear to lack sufficient present ability to assist in his defense by consulting his counsel with a reasonable degree of rational understanding of the facts and legal proceedings against him. Mr. Glass was able to describe the charges he faces, as well as where and when such alleged offenses occurred. He described the possible sentence he might receive, indicating understanding of the seriousness of the charges against him. He was aware of the names of the judge in his case as well as that of his attorneys. He did not express any concerns regarding working with his attorneys. Mr. Glass gave reasonable responses to questions assessing his knowledge of courtroom procedure. There did not appear to be any evidence to suggest that Mr, Glass would present behavioral issues in the course of a trial.
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> "The results of a prior Forensic Psychological Evaluation performed by Dr. McKeown on September 18, 2014, indicated that Mr. Glass' competency to stand trial was significantly impacted possibly by neurological factors and difficulty in effectively communicating to defense counsel. While Mr. Glass has a neurocognitive disorder with significant impairments in memory, he was able to provide details regarding his behaviors in relation to the alleged

> offenses, including his actions and motivations within the timeframe that matches the description of the alleged offenses. As such, Mr. Glass would appear to be able to effectively communicate with his defense counsel in the course of legal proceedings against him."

(Supp. C. 24.)

Although the experts who conducted the evaluations noted Glass's mental impairments, neither determined that Glass was incompetent. In fact, Dr. Griffith explicitly found Glass to be competent to stand trial, despite his mental difficulties. Of course, the results of both evaluations were before the trial court when it made its original determination that Glass was competent. And, because no hearing on Glass's competency was held after the evaluations had been submitted to the trial court, it could be inferred that the trial court believed that no reasonable grounds existed to doubt Glass's competency. See Rule 11.6, Ala. R. Crim. P. Indeed, "'[n]either low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial.' Medina v. Singletary, 59 F.3d 1095, 1107 (11th Cir. 1995)." Connally, 33 So. 3d at 621.

Lastly, the circuit court relied on Glass's attachments to his supplement to his postconviction petition. Glass attached to his

supplement a letter from Dr. Ricardo Roda, presumably Glass's treating physician, to the Social Security Administration, dated August 26, 2020, describing Glass's condition to aid Glass in seeking disability benefits. The letter states that Glass "has symptoms of progressive neurodegeneration with gait abnormalities and incoordination, spasticity, fine motor difficulties, abnormal speech, cognitive decline, possible seizures, sleep disorder, neuropathy, and slurred speech. He requires assistive devices for walking independently. He also has significant speech and cognitive limitations." (C. 22.)

The circuit court also relied on a report, dated August 26, 2020, created by a genetic counselor from Johns Hopkins University that covered the results of Glass's genetic testing. The report included a section on medical history; this section indicated that Glass was 39 years old at the time of the testing, that he had a history of progressive neurocognitive decline, that he began stuttering at the age of 6, that he had struggled with gait abnormalities for years and that the abnormalities had increased over the last 7 years, that he had difficulties with fine motor skills, and that he possibly suffered from seizures. The report described NPC, noting that the symptoms of the

disease were widely variable and may include psychiatric symptoms, movement symptoms, and progressive cognitive decline. Finally, the report concluded that Glass's presentation and symptoms were consistent with NPC.

The last attachment to Glass's petition was a report, dated July 24, 2020, on the results of genetic testing performed by Centogene, a company specializing in rare diseases. The report included Glass's reported symptoms – abnormal sleep, ataxia, cognitive impairment, juvenile-onset dementia, seizures, spastic dysarthia, spastic gait, and speech apraxia – and confirmed Glass's diagnosis of NPC. The remainder of the report included descriptions of a number of gene variants found in the results of genetic testing of Glass, which, quite frankly, are incoherent to a layperson.

The problem with all three documents, which were created years after Glass's guilty plea, is that the documents shed no light on Glass's competence at the time he pleaded guilty. The documents either described typical symptoms of NPC, though not necessarily the symptoms from which Glass was suffering; Glass's condition as of the date the documents were created; or generally described symptoms

Glass had suffered from for years, with no context as to how severe those symptoms were at the time he pleaded guilty or how those symptoms impacted his ability to assist in his "defense by consulting with counsel with a reasonable degree of rational understanding of the facts and the legal proceedings against" him. Rule 11.1, Ala. R. Crim. P. At most, the documents identified the "unspecified neurocognitive disorder" from which Dr. McKeown and Dr. Griffith suspected Glass suffered as NPC. Yet the symptoms from which Glass suffered at the time he pleaded guilty, perhaps caused by NPC, were well known to Glass's forensic examiners, the parties, and the trial court. Simply adding the name of a disorder cannot now support a finding that Glass was incompetent at the time he pleaded guilty. Again, "[t]he law is clear that [p]roof of the incompetency of an accused to stand trial involves more than simply showing that the accused has mental problems or psychological difficulties." Connally v. State, 33 So. 3d 618, 621-22 (Ala. Crim. App. 2007) (quotations omitted).

Glass asserts in his brief that the State has asked this Court to reweigh the evidence, particularly the testimony of McMillan-Cox, but this is not so. On the contrary, the State's position is that Glass failed

to meet his burden of proof as a matter of law. This Court is assuming Glass's evidence to be true.[4] Even in this light, however, this Court holds that Glass failed, as a matter of law, to offer evidence that could support a determination that he was incompetent at the time he pleaded guilty. Therefore, the circuit court erred in granting Glass postconviction relief.

Accordingly, the judgment of the circuit court is reversed, and this case is remanded to the circuit court to set aside its order granting Glass's Rule 32 petition and to issue an order in accordance with this opinion.

REVERSED AND REMANDED.

Kellum and McCool, JJ., concur. Cole and Minor, JJ., concur in the result.

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[4]Rule 32.9(d), Ala. R. Crim. P., requires that when evidence is taken, as it was here, the court shall make findings of fact relating to each material issue of fact presented. The circuit court did not make findings of fact. Because the circuit court made no specific findings of fact, this Court has assumed that the circuit court made those findings necessary to support the judgment. Transamerica Com. Fin. Corp. v. AmSouth Bank, N.A., 608 So, 2d 375, 378 (Ala. 1992) (citing Fitzner Pontiac–Buick–Cadillac, Inc. v. Perkins & Assocs., Inc., 578 So. 2d 1061 (Ala. 1991)).