DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. HAROLD DWIGHT VANN, JR., Appellant.	)	1 CA-CR 09-0059 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-102630-001 SE

The Honorable Helene F. Abrams, Judge

AFFIRMED

James J. Haas, Maricopa County Public Defender — Phoenix
By Karen M. Noble, Deputy Public Defender
Attorney for Appellant

Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Aaron J. Moskowitz, Assistant Attorney General
Attorneys for Appellee

K E S S L E R, Judge

¶1 Harold Dwight Vann ("Vann" or "Defendant") appeals from the superior court's judgment and sentence for aggravated assault with one prior felony conviction. Vann contends the court failed

to conduct an adequate colloquy to confirm that he was competent to waive his right to a jury trial. For the reasons stated below, we affirm the court's judgment and sentence.

FACTUAL AND PROCEDURAL HISTORY

¶2 On January 15, 2008, a complaint was filed in Maricopa County Superior Court against Vann for aggravated assault, a class 5 felony. The complaint alleged that while in custody at a Mesa jail, Vann intentionally placed a law enforcement officer in reasonable apprehension of physical injury. A grand jury later indicted Vann for that offense and on November 17, 2008, the State amended the indictment to allege four historical prior felony convictions.

¶3 At the trial management conference that same day, the superior court addressed Vann to explain the terms of a stipulation ("stipulation") of a prior felony conviction. The stipulation provided that the State agreed to allege only one prior felony conviction, possession of narcotic drugs, in exchange for Vann agreeing to proceed with a bench trial. After the court addressed Vann to determine whether he understood the stipulation's terms, the court found Vann "knowingly, intelligently and voluntarily" waived his right to a jury trial. A few days later, Vann signed the stipulation.[1]

[1] The stipulation was filed almost one month later on December 18, 2008.

¶4 During the bench trial on November 21, 2008, the superior court heard testimony from Vann and the two officers involved in the incident. The court found Vann guilty of aggravated assault and of violating the terms and conditions of probation, which he was serving for disorderly conduct in another case.

¶5 During the December 18, 2008 sentencing, the superior court again asked Vann whether he signed and understood the terms of the stipulation indicating he agreed he was convicted of possession of narcotic drugs. After Vann acknowledged that he signed and understood the terms of the stipulation, the court accepted it and found Vann knowingly, intelligently, and voluntarily admitted to the prior felony conviction. The court sentenced Vann to a slightly mitigated term of two years in prison. The court also sentenced him to 180 days of jail for his probation violation and gave him credit for the 180 days he already served.

¶6 Vann filed a timely notice of appeal and we have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031, and -4033 (2010).

DISCUSSION

¶7 Vann argues the superior court denied him his due process and fundamental fairness rights because it failed to conduct an adequate colloquy to confirm he was competent to waive his right to a jury trial as required by Arizona Rules of Criminal Procedure

("Ariz. R. Crim. P.") 17 and 18. Specifically, Vann contends the court failed to ask whether he was taking medications, and if not, whether he needed medications to assist him in understanding proceedings. He argues that several documents in the record should have triggered the court's inquiry into whether he was receiving medications that impacted his competency to give a valid waiver.

¶8 The State argues a waiver of a jury trial in favor of a bench trial does not receive the exact same procedural protections that apply to a change of plea under Ariz. R. Crim. P. 17.3. *See State v. Conroy*, 168 Ariz. 373, 375, 814 P.2d 330, 332 (1991) (compliance with the entire *Boykin v. Alabama*[2] litany is not required when a defendant only waives his right to have his guilt or innocence determined by a judge instead of a jury); *see also State v. Butrick*, 113 Ariz. 563, 565-66, 558 P.2d 908, 910-11 (1976) (same).

¶9 The standard of review applicable to the waiver of one's right to a jury trial has not been settled by Arizona law. The Arizona Supreme Court has applied the abuse of discretion standard when deciding various issues concerning waiver. *State v. Djerf*, 191 Ariz. 583, 594, ¶ 35, 959 P.2d 1274, 1285 (1998) (abuse of discretion standard applied to determine whether defendant waived his right by entering a guilty plea); *State v. Cornell*, 179 Ariz. 314, 321-22, 878 P.2d 1352, 1359-60 (1994) (abuse of discretion

[2] 395 U.S. 238, 242 (1969).

applied even though the applicable standard of review governing defendant's waiver of counsel was not settled); *State v. Bishop*, 139 Ariz. 567, 569, 679 P.2d 1054, 1056 (1984) (finding court abused its discretion by finding defendant voluntarily waived her right to be present at trial). The Ninth Circuit has held that waiving one's right to a jury trial is a "mixed question of fact and law" warranting de novo review. *United States v. Duarte-Higareda*, 113 F.3d 1000, 1002 (9th Cir. 1997); *see also Mack v. Cruikshank*, 196 Ariz. 541, 544, ¶ 6, 2 P.3d 100, 103 (App. 1999) (citation omitted) (finding due process claims involve issues of law, which are reviewed de novo). Consequently, we review de novo whether the superior court obtained a valid waiver of Vann's right to a jury trial, but we defer to the court's factual findings. *State v. Winegar*, 147 Ariz. 440, 445, 711 P.2d 579, 584 (1985) (citation omitted) ("'the trial judge has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and . . . can better assess the impact of what occurs before him.'").

¶10 Subject to certain exceptions, "[t]he right to a jury trial is a fundamental right secured to all persons accused of a crime by the Sixth Amendment of the United States Constitution and, in Arizona, by Article 2, [Sections] 23 and 24 of the Arizona Constitution." *Butrick*, 113 Ariz. at 565, 558 P.2d at 910. Under Ariz. R. Crim. P. 18.1(b), however, a "defendant may waive the

right to trial by jury with consent of the prosecution and the court." Before accepting a waiver "the court shall address the defendant personally, advise the defendant of the right to a jury trial and ascertain that the waiver is knowing, voluntary, and intelligent." *See also Boykin*, 395 U.S. at 242. Further, Ariz. R. Crim. P. 18.1(b)(2) provides a waiver of a jury trial "shall be made in writing or in open court on the record"[3] and "is valid only if the defendant is aware of the right and manifests an intentional relinquishment or abandonment of such right." *Baker*, 217 Ariz. at 120, ¶ 7, 170 P.3d at 729. Thus, in determining whether the superior court obtained a valid waiver of Vann's right to a jury trial, we consider whether he understood that the facts of the case would be determined by a judge and not a jury. *Conroy*, 168 Ariz. at 376, 814 P.2d at 333 (citation omitted).

¶11 If there is sufficient evidence in the record which should have alerted the trial judge that the defendant may not have been competent to understand the rights he was waiving in agreeing to a bench trial, the court must undertake a more specific colloquy with the defendant to ensure the defendant was competent to waive that right. In *State v. Cameron*, 146 Ariz. 210, 704 P.2d 1355 (App. 1985), we remanded the matter for a specific finding whether

[3] "We cannot presume a valid waiver of a jury right based on a silent record." *State v. Baker*, 217 Ariz. 118, 120, ¶ 8, 170 P.3d 727, 729 (App. 2007) (citations omitted).

the defendant was competent to waive his right to a jury trial. Prior to trial the court had ordered Rule 11 competency hearings in which there was conflicting testimony about defendant's sanity. *Id.* at 211, 704 P.2d at 1356. During trial, the court heard testimony that while defendant was awaiting trial he had an episode of psychotic behavior in the jail, had undergone prior psychiatric hospitalization and his parent suffered from a severe mental illness. *Id.* We held that the court's colloquy was inadequate to support a finding of competency to waive a jury because the defendant had only answered in monosyllabic answers during the colloquy, there was conflicting evidence as to defendant's sanity and competency to stand trial, and we could not agree that the medication which contributed to the appearance of competency to stand trial necessarily proved a competence to waive constitutional rights. *Id.* at 213, 704 P.2d at 1358.

¶12 In *United States v. Christensen*, 18 F.3d 822 (9th Cir. 1994), the defendant requested a psychiatric evaluation to determine his competency to stand trial and then waived his right to a jury trial. *Id.* at 823. During a colloquy at the beginning of trial, the court asked and defendant agreed that he had signed the waiver and that he understood he was waiving the right to have twelve jurors find him guilty, but would instead be tried by the court. *Id.* After the court found him guilty, he moved for a new trial to have a psychiatric evaluation to assert an insanity

defense, presenting to the court a declaration by a psychiatrist that had not examined him but who had said Christensen was a manic-depressive, making him incompetent to tell the difference between right and wrong. The court denied that motion. *Id.* at 823-24. At the sentencing hearing, the same psychiatrist testified that defendant suffered from a bipolar disorder affecting his ability to appreciate the wrongfulness of his conduct. *Id.* On appeal, the Ninth Circuit held that in "cases where the defendant's mental or emotional state is a substantial issue," trial courts must conduct fuller inquiries. *Id.* at 825. The court found such substantial evidence because the trial court was aware of defendant's manic-depressive disorder and a psychiatrist had questioned his competency to stand trial. *Id*. In reaching that conclusion, the court distinguished an earlier case, *United States v. Cochran*, 770 F.2d 850, 851 (9th Cir. 1985), in which the colloquy was similarly brief, but there was no evidence that the wavier was anything other than knowing and intelligent. *Christensen*, 18 F.3d at 825.

¶13 We find this case is unlike *Cameron* and *Christensen* in two important respects. First, the colloquy here was much more extensive with the judge asking numerous questions about Vann's understanding of his right to a jury trial and his waiver of that right. The court personally addressed Vann on the record to determine whether he reviewed the "Waiver of Trial by Jury" document and agreed that he did not wish to have a jury trial.

Vann indicated he reviewed the document with his attorney and that he did not want a jury trial. Vann acknowledged that he understood he was being charged with aggravated assault, a class 5 felony, and that the State would proceed with an allegation of only one prior felony that it was not required to prove. Vann stated that he understood the sentencing range in which probation was not an option.

¶14 Vann also indicated he understood that by waiving a jury trial and accepting the stipulation, he was giving up a number of constitutional rights related to the State not having to prove the prior felony conviction such as the right to plead not guilty, be represented by counsel, be presumed innocent, to confront and cross-examine witnesses called by the State, present evidence, and subpoena witnesses to testify on his behalf. Additionally, Vann testified that he discussed the waiver with his attorney, understood its terms, and signed it. *See* Ariz. R. Crim. P. 18.1(b)(2). He also acknowledged that a finding of guilt constituted an automatic violation of his probation and that he could be ordered to spend one year in county jail. Vann stated he did not have any questions and that "some of the little things that were so minor just seem[ed] to be really blown out of proportion." The court concluded that Vann's waiver of jury trial was made "knowingly, intelligently and voluntarily." Vann points to nothing in that recorded colloquy which would have alerted the trial court

to any emotional or mental condition affecting Vann's competency to waive his right to a jury trial. We will not infer such a fact especially because the trial court is in a much better position to assess the parties before it. *Winegar*, 147 Ariz. at 445, 711 P.2d at 584.

¶15 Second, unlike *Cameron* and *Christensen*, there is insufficient evidence that Vann suffered from a severe mental or emotional condition that affected his competency to waive a jury. Moreover, he never requested a psychiatric evaluation to determine his competency.

¶16 Vann argues that the court should have inquired whether he was taking medications or whether the lack of medications affected his ability to understand the proceedings. We disagree for three reasons. First, to the extent Vann relies on *State v. Wagner*, 114 Ariz. 459, 561 P.2d 1231 (1977), we find that reliance misplaced. In *Wagner*, there was sufficient doubt as to the defendant's competency to enter a guilty plea because the defendant attacked a fellow inmate with a razor blade in jail, which prompted defense counsel to notice an insanity defense and resulted in the State requesting a mental health examination of defendant. *Id.*, 114 Ariz. at 461-62, 561 P.2d at 1233-34. Additionally, unlike the present case, *Wagner* was confined as a pyschopathic patient, he killed his infant son, attempted suicide, and witnesses testified he was insane. *Id.*, 114 Ariz. at 462, 561 P.2d at 1234. Here,

there is no comparable evidence in the record indicating Vann was incompetent to waive his right to a jury trial.

¶17 Second, our review of the record does not show Vann or his attorney raised the issue of competency at trial, nor alerted the superior court that he did not understand the facts of the case would be determined by a judge and not a jury. *See State v. Morris*, 121 Ariz. 364, 366, 590 P.2d 480, 482 (App. 1979) (citation omitted) (finding the superior court "was entitled to some extent to rely upon counsel's failure to raise the question . . . of appellant's competency to proceed."). The court knew Vann was not taking medication at the time of the incident; however, Vann did not present evidence indicating his failure to take medications at the time of the incident affected his understanding of the court's colloquy ten months later. In fact, during the bench trial merely four days after the colloquy, Vann indicated he was "taking [medications,] . . . thinking very clearly[,]" and that the medications were helping him. Consequently, there was no evidence indicating Vann's medications, or his failure to take them, affected his ability to understand the proceedings.[4]

[4] At the December 18, 2008 sentencing, Vann's attorney stated he did not believe Vann was "getting [his] medication[,]" that Vann was "having some issues on that[,]" and that he believed Vann needed "to get on his medication." That same day, however, Vann testified his medication was already increased three times that month because the case was causing him a significant amount of stress. The court balanced Vann's five prior felony convictions against the mental health issues that he "obviously

¶18 Third, we disagree with Vann that there was substantial evidence to question his competency to waive his right to a jury trial. Vann points out the release questionnaire indicated he acted irrationally, he never signed a financial worksheet, and the notice of defenses checking "[l]ack of [c]ulpable [m]ental [s]tate." While the release questionnaire indicated an officer attempted to move Vann from a barred to a padded cell because he was acting irrationally, the question asking whether there is "any indication the defendant is . . . [m]entally disturbed?" was not checked. Thus, the release questionnaire merely mentioning Vann acted irrationally is not enough to trigger the court's inquiry into whether he was competent. Additionally, the absence of Vann's signature on the financial worksheet should not have triggered the court's inquiry into his mental state because the reason for his missing signature is unknown. Further, the notice of defenses raising "lack of culpable mental state" was merely a planned defense at trial that should not have alerted the superior court that Vann's competency was at issue. Indeed, Vann never pursued that defense.

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suffer[s] from and that [he] probably [was] suffering from at the time of this event." The court, after having considered all of the circumstances of the case, also considered Vann's mental health history during sentencing as a slight mitigating factor. The court, being able to observe Vann, is entitled to deference as to whether Vann's medication or lack thereof affected his competency to waive a jury trial. *Winegar*, 147 Ariz. at 445, 711 P.2d at 584.

¶19 While a court may have a sua sponte duty to make further inquiry when evidence is presented to raise a question of constitutional importance, *State v. Goodyear,* 100 Ariz. 244, 248, 413 P.2d 566, 569 (1966), Vann points to no case which requires a trial court to search the record in the hopes of finding any tidbit of evidence to require the court to question a defendant's competency to waive a right to a jury trial. While it might be a better practice for a court to ask about any medications in conducting a Rule 18 colloquy to ensure competency, the record in this case was insufficient to require such an inquiry.

CONCLUSION

¶20 We find that Vann's waiver of his right to a jury trial was knowing, voluntary, intelligent, and the superior court fulfilled its obligation under Ariz. R. Crim. P. 18.1. Accordingly, we affirm his conviction and sentence.

/s/
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DONN KESSLER, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
PETER B. SWANN, Judge