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

CARL EDWARD MCGEE, Petitioner, v. THE HONORABLE WARREN J. GRANVILLE, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, STATE OF ARIZONA, Real Party in Interest.	)	1 CA-SA 10-0231 DEPARTMENT D Maricopa County Superior Court No. CR 2006-006375-001 DT **DECISION ORDER**

This special action arises out of an order denying Carl Edward McGee's motion to dismiss the State's Notice of Intention to Seek the Death Penalty. Having considered the petition for special action, the State's response, McGee's reply, and the testimony and exhibits McGee and the State submitted at the evidentiary hearing on the motion to dismiss, the Court, Presiding Judge Lawrence F. Winthrop and Judges Patricia K. Norris and Patrick Irvine participating, accepts jurisdiction as required by Arizona Revised Statutes ("A.R.S.") section 13-753(I) (2010), but denies relief.

BACKGROUND AND STATUTORY REQUIREMENTS FOR MENTAL RETARDATION

In 2006, the grand jury indicted McGee on first-degree murder for the 1980 death of a 79-year-old woman. The State filed a Notice of Intention to Seek the Death Penalty in the event of a conviction for first-degree murder, and McGee moved to dismiss the Notice, asserting mental retardation. The superior court held an evidentiary hearing pursuant to A.R.S. § 13-753 and *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

At the hearing, as relevant here, McGee principally relied on testimony from licensed psychologist and psychological consultant, Stephen Greenspan, Ph.D., concerning McGee's adaptive behavior both before and after age 18, intellectual functioning, and mental retardation. The State called John Shaughnessy, Ph.D., the licensed psychologist who examined McGee for his competency to stand trial, to testify regarding malingering,[1] and licensed psychologist John Toma, Ph.D., to testify regarding McGee's adaptive behavior, intellectual functioning, and malingering. By minute entry entered on October 5, 2010 ("minute entry ruling"), the court found, based on substantial evidence (as we discuss below), McGee had failed

[1]A person malingers when he or she does not provide his or her best effort when taking a test.

to prove by clear and convincing evidence he met the statutory requirements for mental retardation.

For an Arizona court to determine a defendant has mental retardation, the defendant must demonstrate "[1] significantly subaverage general intellectual functioning, [2] existing concurrently with significant impairment in adaptive behavior, [3] where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen." A.R.S. § 13-753(K)(3). The defendant has the burden of proving all three prongs by clear and convincing evidence. A.R.S. § 13-753(G).

McGee challenges the court's ruling denying his motion to dismiss the State's Notice of Intention to Seek the Death Penalty for four reasons.

ANALYSIS

I. Findings on Intellectual Functioning

McGee first argues the superior court failed to exercise its discretion or perform a duty required by law because it failed to make any findings on McGee's intellectual functioning despite evidence presented of his "significantly subaverage" intelligence quotient ("IQ") scores.[2] We disagree. Under the

[2]Subsection G of A.R.S. § 13-753 establishes a rebuttable presumption that a defendant has mental retardation if the trial court determines the defendant's IQ is 65 or lower. Here, McGee's full IQ scores ranged from 50 to 66, but two psychologists (Dr. Toma and another expert the State called,

circumstances of this case, the superior court was not required to determine a specific IQ score because it found McGee had failed to sustain his burden of showing the other necessary requirements for a finding of mental retardation under A.R.S. § 13-753(K)(3).

II. Reliance on Dr. Shaughnessy's Testimony

McGee next argues the superior court abused its discretion and acted arbitrarily and capriciously by allowing, and making findings of fact based on, the testimony of Dr. Shaughnessy. We disagree.

The record does not reflect the superior court gave Dr. Shaughnessy's testimony undue weight or considered it beyond the limited purpose for which the court admitted his testimony. Dr. Shaughnessy examined McGee for his competency to stand trial and unequivocally testified his competency determination was different from an IQ test. The court admitted his testimony for the limited purpose of showing McGee had previously malingered. Thus, the superior court did not abuse its discretion in admitting Dr. Shaughnessy's testimony for this limited purpose and referring to it in its findings.

Michael Brad Bayless, Ph.D.) testified they believed McGee malingered when taking the tests.

III. Adaptive Behavior and Dr. Greenspan's Testimony

As part of his third argument, McGee first argues the superior court "misapprehended" Dr. Greenspan's adaptive behavior testimony because it found he had only determined significant limitations in two areas of adaptive functioning.[3] We disagree; the court's ruling reflects no misapprehension. Consistent with Dr. Greenspan's testimony that McGee was "deficient in all areas," the court noted Dr. Greenspan testified "defendant had significant limitation in *at least two* of the above domains, and so, is mentally retarded." (Emphasis added.)

Second, McGee argues the court arbitrarily and capriciously ignored Dr. Greenspan's testimony as to McGee's overall deficits

[3]As the court explained in its minute entry ruling, there are two schools of thought in the psychiatric field to determine adaptive behavior. For a diagnosis of intellectual disability, the American Association on Intellectual and Developmental Abilities ("AAIDD") requires "significant limitations" in one of the three types of adaptive behavior: conceptual, social, or practical. AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 43 (11th ed. 2010); *see* Revised Medical Criteria for Evaluating Mental Disorders, 75 Fed. Reg. 51,336, 51,339 (Aug. 19, 2010) (to be codified at 20 C.F.R. pt. 404). In its Diagnostic and Statistical Manual ("DSM-IV"), the American Psychiatric Association ("APA") requires "significant limitations in adaptive functioning in at least two of the following skills areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." APA, *Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed. 2000); *see* Revised Medical Criteria for Evaluating Mental Disorders, 75 Fed. Reg. at 51,339.

in adaptive behavior. We disagree. The court was not required to accept Dr. Greenspan's testimony to the exclusion of other evidence and testimony presented at the *Atkins* hearing. "The trial judge has broad discretion in determining the weight and credibility given to mental health evidence." *State v. Doerr*, 193 Ariz. 56, 69, ¶ 64, 969 P.2d 1168, 1181 (1998). Here, the court relied on other evidence contrary to Dr. Greenspan's testimony in reaching its findings and, thus, did not abuse its discretion.[4]

Third, McGee argues the court improperly substituted its own adaptive behavior assessment "contrary to established national norms" that he asserts required it to consider only deficits. We disagree. Our supreme court has recognized A.R.S. § 13-753 requires the court to make an "overall assessment of the defendant's ability to meet society's expectations of him." *State v. Grell*, 212 Ariz. 516, 529, ¶ 62, 135 P.3d 696, 709 (2006). The court was thus required to make this assessment.

Further, the court made the assessment in accordance with A.R.S. § 13-753 and its interpretive case law when it considered capabilities as well as deficits. To assess adaptive behavior, a court is required to consider both capabilities and

[4]See minute entry ruling at pages nine to eleven, relying on items such as police reports, medical requests, tank orders, jail calls, and evidence from the reports and testimony of Drs. Toma, Shaughnessy, and Greenspan.

limitations when evaluating the "effectiveness or degree to which the defendant meets the standards of personal independence and social responsibility expected of the defendant's age and cultural group." A.R.S. § 13-753(K)(1). As our supreme court explained in *Grell*:

> The [Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV")[5]] definition of mental retardation, . . . while similar in overall meaning, is not the same as the statutory definition. The statute requires an overall assessment of the defendant's ability to meet society's expectations of him. It does not require a finding of mental retardation based solely on proof of specific deficits or deficits in only two areas [of the DSM-IV].

212 Ariz. at 529, ¶ 62, 135 P.3d at 709 (citation omitted); *see also State v. Arellano*, 213 Ariz. 474, 479, ¶ 18, 143 P.3d 1015, 1020 (2006) ("evidence of any skills or deficiencies in adaptive behavior exhibited by a defendant, even after age eighteen, helps determine whether a defendant has mental retardation"). The court thus assessed McGee's adaptive behavior as required under Arizona law and, as already noted, the record amply supports the court's detailed findings of McGee's ability to meet society's expectations.

Although not explicitly briefed, McGee suggests the court should have relied on Dr. Greenspan's age-of-onset testimony -- that McGee qualified for a diagnosis of mild mental retardation

[5]*See supra* note 2.

because there is "strong evidence that his recent intellectual impairments can be traced back to the childhood period." Both in his testimony and his report, Dr. Greenspan explained McGee met the age-of-onset prong based on his school performance and reports of his retrospective adaptive functioning as evidenced by his school records and interviews and tests Dr. Greenspan conducted with McGee, his family, his friends, and his elementary school teacher.

Although Dr. Greenspan testified he believed McGee met the mental retardation requirements before age 18, the court was presented with contrary evidence. For example, at the hearing, none of the teachers or school administrators testified McGee had mental retardation or had been assigned -- because of mental retardation -- to special education classes. Indeed, at least two witnesses acknowledged McGee could have been assigned to special education classes for other reasons. Further, Dr. Toma testified, based on records he reviewed and his interviews with McGee's mother and one of his sisters, that although McGee was "slow," the evidence does "not necessarily reflect subaverage intellectual ability" before age 18. This and other evidence in the record supports the superior court's conclusion McGee had failed to prove by clear and convincing evidence he had significantly subaverage intellectual functioning and adaptive behavior impairments before age 18. For this reason alone, the

superior court did not abuse its discretion in finding McGee had failed to prove he had mental retardation.

Finally, although also not explicitly briefed, McGee suggests the court should not have relied on Dr. Toma's adaptive behavior assessment,[6] asserting Dr. Toma did not use accepted methodology in evaluating his adaptive behavior.[7] We disagree. "Questions about the accuracy and reliability of a witness'[s] factual basis, data, and methods go to the weight and credibility of the witness'[s] testimony . . . ." *Logerquist v. McVey*, 196 Ariz. 470, 488, ¶ 52, 1 P.3d 113, 131 (2000). Thus, the court was entitled to consider and rely on Dr. Toma's testimony because the alleged flaws in his methodology go to the weight of the testimony, not its admissibility.

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[6]For his adaptive behavior assessment, Dr. Toma interviewed McGee's mother and sister using the Adaptive Behavior Assessment System ("ABAS") as a "guide." Instead of completing the ABAS forms for McGee's mother and sister individually, Dr. Toma asked them questions based on the form, took notes on their answers, and scored their answers based on all of the information he received from both informants. At trial, McGee's counsel cross-examined Dr. Toma on his methodology, and Dr. Toma acknowledged he completed one ABAS form for both interviews after consolidating "all this information that [he] gathered" and did not separately rate each informant.

[7]Dr. Greenspan criticized this methodology, testifying Dr. Toma did not follow the proper protocol for administering the ABAS. He testified the ABAS test manual states "at least three times in the first chapter, [that] it's a rating instrument that's filled out by individual raters. You shouldn't use more than one rater. There's nothing in there that says that it's appropriate for the psychologist or evaluator to fill it out himself based on his own impressions or interviews."

IV. Due Process Violation

McGee argues the superior court violated his right to due process because it required him to prove mental retardation by clear and convincing evidence.[8] We disagree. In 2006, the Arizona Supreme Court held placing the burden on defendant to prove mental retardation by clear and convincing evidence "does not violate constitutional standards." *State v. Grell*, 212 Ariz. 516, 525, ¶ 41, 135 P.3d 696, 705 (2006).

Accordingly,

IT IS ORDERED denying McGee's request for this court to vacate and remand for dismissal the State's Notice of Intention to Seek the Death Penalty.

/s/

PATRICIA K. NORRIS, Judge

[8]McGee asserts the court should have applied the preponderance of the evidence standard as discussed by the dissent in *State v. Grell*, 212 Ariz. 516, 530-34, ¶¶ 70-92, 135 P.3d 696, 710-14 (2006).