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SUPREME COURT OF ARKANSAS

No. CR 10-907

DAVID WAYNE HUGHES,
APPELLANT,

VS.

STATE OF ARKANSAS,
APPELLEE,

Opinion Delivered April 7, 2011

APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT,
NO. CR-2009-712,
HON. JAMES O. COX, JUDGE,

APPEAL DISMISSED.

KAREN R. BAKER, Associate Justice

Appellant David Wayne Hughes appeals from a judgment of acquittal based on mental disease or defect entered on June 14, 2010, by the Sebastian County Circuit Court. For reversal, he argues two points: (1) that the trial court erred by finding that he committed the offense of terroristic threatening; and (2) that by compelling him to utilize the affirmative defense of mental disease or defect, he was deprived of his constitutional right to a trial by jury. This case was certified to us from the court of appeals as involving an issue of first impression, a question pertaining to the interpretation of the federal constitution, and a substantial question of law concerning the interpretation of an act of the Arkansas General Assembly. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(1), (3), and (6) (2010). We dismiss this appeal.

By criminal information filed on June 22, 2009, appellant was charged with one count of terroristic threatening in the first degree in violation of Ark. Code Ann. § 5-13-301 (Repl.

2006), a Class D felony, for events occurring on May 31, 2009, in that he feloniously and with the purpose of terrorizing another person, threatened to cause death or serious physical injury to the congregation of Harvest Time Tabernacle Church ("Harvest Time"). On December 30, 2009, the State filed a motion for mental evaluation of appellant asserting that there was reason to believe that mental disease or defect will or has become an issue in the case, and/or that there was reason to doubt appellant's fitness to proceed. The motion contained allegations that while being interviewed by Detective Rodney Reed, appellant stated that he would more than likely kill himself, that he requested a gun to be able to end the matter, and that he alternated between crying like a baby and flying into a rage of anger. On January 4, 2010, an order was entered for the mental-health evaluation of appellant, and the report of the mental examination was filed on April 9, 2010.

On April 21, 2010, appellant filed a motion in limine, a demand for a jury trial, and a motion for a determination that Ark. Code Ann. § 5-2-313 was unconstitutional as applied to him. He sought to preclude evidence of his mental disease or defect, arguing that he waived this affirmative defense. Appellant also argued that to the extent Ark. Code Ann. § 5-2-313 does not require a trial by jury on the underlying offense when the defense of mental disease or defect is waived, the statute violated his rights under article 2, sections 7 and 23 of the Arkansas Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. By order entered on May 26, 2010, the trial court denied the motion in limine, the demand for a jury trial, and the request to find Ark. Code Ann. § 5-2-313 unconstitutional.

On May 26, 2010, a hearing on the underlying case of terroristic threatening was held. Mark Turner testified that at a meeting on June 1, 2009, appellant told Turner that the previous Sunday, he had gone to Harvest Time's parking lot, sat outside with a gun for fifteen minutes, and contemplated going inside and shooting people. Several days later, appellant, appearing angry and upset, told Turner that he had been informed that he could no longer attend Harvest Time. Because he was afraid, Turner informed the members of Harvest Time of his conversations with appellant. Turner also testified that appellant had told him in previous conversations about how he had gone into the woods, put a gun to his head, and tried to fire it.

Rodney Reed, a detective with the Fort Smith Police Department and a member of Harvest Time, testified that after appellant was arrested and Mirandized, he questioned him. During the questioning, Reed stated that appellant asked for his gun so that appellant could take his own life and that he talked about having previously placed a revolver to his head but stated that the gun never fired when he pulled the trigger. Reed said that appellant displayed various moods during the interview: somberness, anger, and crying. Appellant also told Reed that his son had committed suicide with appellant's gun several years earlier and that his daughter and son-in-law were keeping his granddaughter from him because he refused to give them money, which was the reason he was so outraged on the day he went to Harvest Time.

Appellant's wife, Lili Hughes, testified that on May 31, 2009, appellant went to Harvest Time and was going to deliver some gifts to their granddaughter. She stated that when he left their home he was not depressed and was not making threats toward anyone and

did not take a gun with him because appellant did not own a gun. She disputed that appellant told Turner about having thoughts of shooting somebody, but she admitted that appellant had been treated for mental illness.

Based upon the testimony from the May 26, 2010 hearing, documentary evidence, and arguments from posthearing briefs, the circuit court entered a judgment of acquittal based on mental disease or defect on June 14, 2010.[1] The court found that appellant had committed the offense of terroristic threatening in the first degree and that the offense involved a substantial risk of bodily injury to another person and/or a substantial risk of serious damage to the property of another. The court stated that appellant suffered at the time of commission of the offense from both a mental disease and a mental defect and did not have the capacity to conform his conduct to the requirements of the law. Also, the circuit court stated that appellant remained affected by both mental disease and mental defect and committed him to the custody of the Director of the Department of Human Services. Appellant filed a timely notice of appeal.

Arkansas Rule of Appellate Procedure–Criminal 1(a) (2010) provides that "[a]ny person convicted of a misdemeanor or a felony by virtue of trial in any circuit court of this state has the right to appeal to the Arkansas Court of Appeals or to the Supreme Court of

[1]The order specifically incorporated the report of Dr. Paul Deyoub who concluded that appellant, at the time of the examination, had the capacity to understand the proceedings against him and to assist effectively in his defense. Dr. Deyoub also found that, at the time of the commission of the offense, appellant had the capacity to appreciate the criminality of his conduct, but he did not have the capacity to conform his conduct to the requirements of the law and that he had a mental disease and a mental defect at the time of the offense.

Arkansas." Complementing this rule is Ark. Code Ann. § 16-91-101(a) (Repl. 2006), which states that "[a]ny person convicted of a misdemeanor or a felony by virtue of a trial in any circuit court of this state has the right of appeal to the Supreme Court." In his notice of appeal, appellant asserts "that he appeals . . . from the Order and Judgment entered in this matter on June 14, 2010, and all prior Orders including the order entered on May 26, 2010, in favor of the State of Arkansas and against the Defendant, David Hughes." Appellant was not *convicted* of a misdemeanor or a felony by the circuit court. Because the Arkansas Rules of Criminal Appellate Procedure and Arkansas statutes do not confer a right of direct appeal from a judgment of acquittal based on mental disease or defect, we dismiss this appeal.

Appeal dismissed.

HANNAH, C.J., dissents.

JIM HANNAH, Chief Justice, dissenting. I respectfully dissent. The circuit court determined that "the Defendant committed the underlying offense of terroristic threatening." However, the majority concludes that Hughes may not appeal that decision.

Although the majority relies on Arkansas Rule of Appellate Procedure—Criminal 1(a) (2010) and Arkansas Code Annotated section 16-91-101(a) (Repl. 2006), neither supports the majority's decision. Rule 1(a) and section 16-91-101(a) provide that a "person convicted of a misdemeanor or a felony" has a right of appeal. Because Hughes was found to have committed terroristic threatening, which is a felony, *see* Arkansas Code Annotated section 5-13-301 (Repl. 2006), he was "convicted of a misdemeanor or felony." "[T]he word

conviction can mean either the finding of guilt or the entry of a final judgment on that finding." *United States v. Deal*, 508 U.S. 129, 131 (1993). The United States Supreme Court stated that "[i]n the context of § 924(c)(1), we think it unambiguous that 'conviction' refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction." *Deal*, 508 U.S. at 132. This same principle applies in the present case. The only way to read section 16-91-101(a) and Rule 1(a), and not reach an absurd result, "is to read 'conviction' to include" the finding of guilt based on proof beyond a reasonable doubt of the underlying crime. Because Hughes was found guilty, under Rule 1(a) and section 16-91-101(a), he has a right of appeal. That a subsequent acquittal was entered based on a mental-health report under Arkansas Code Annotated section 5-2-313 (Repl. 2006), is of no moment. Hughes was found guilty of terroristic threatening before he was acquitted based on a mental defect.[2] Before a criminal defendant can be acquitted as a consequence of a mental

[2]I note another concern. The facts of this case are unusual. It is not typical for the State, rather than the criminal defendant, to assert mental incompetency. Where a defendant asserts incompetency, concerns about due process and the right to appeal are lessened because the criminal defendant is attempting to prove his own incompetency. The United States Supreme Court, in *Jones v. United States*, 463 U.S. 354, 367 (1983), noted that under the statute at issue before the Court, automatic commitment occurred "only if the acquittee himself advances insanity as a defense and proves that his criminal act was a product of his mental illness." Where a criminal defendant advances the defense of insanity, he or she necessarily admits commission of the offense, and, on that basis, "there is good cause for diminished concern as to the risk of error." *Id*. Here, however, Hughes never admitted that he had committed the offense and required the State to prove that he did. The circuit court determined that Hughes committed terroristic threatening, but acquitted Hughes because of a mental defect, and Hughes was committed to the Arkansas State Hospital. "Commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Jones*, 463 U.S. at 361 (quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979)). In the case before this court, the State has deprived Hughes of his liberty by committing him to the state hospital and denied him the right to appeal the underlying decision on the

defect, there must be a judicial determination that, based on proof beyond a reasonable doubt, the criminal defendant committed the underlying crime.

It is only after the State meets its burden of proving the charged crime beyond a reasonable doubt that acquittal based on insanity is considered. This is because insanity is not an element of the charged crime, but instead is a defense, making the standard of proof for insanity distinct from that required for the charged crime. "If the state meets its traditional burden of proof beyond a reasonable doubt, the defendant then bears the burden of establishing that he was insane at the time of the offense and, therefore, exempt from criminal responsibility." *State v. Williams*, 804 So. 2d 932, 938 (La. Ct. App. 2001); *see also State v. Platt*, 19 P.3d 412, 417 (Wash. 2001) (quoting *State v. Platt*, 984 P.2d 494, 505 (Wash. 2001)) (standard to prove the criminal act in the context of mental disease or defect case requires proof beyond a reasonable doubt); *Bethea v. United States*, 365 A.2d 64, 94 (D.C. Cir. 1976) (only after the charged crime has been proved beyond a reasonable doubt is the issue of insanity considered).

Hughes was charged with, and convicted of, terroristic threatening in the first degree, a Class D felony. The requirements of Rule 1(a) and section 16-91-101(a) are both met. The majority errantly deprives Hughes of his right to appeal. Therefore, I dissent.

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charged crime that permitted the commitment. He has been denied due process. It should also be noted that the State continues to errantly argue that it was not required to prove beyond a reasonable doubt that Hughes committed the crime. Rather than a diminished concern, the facts of this case give cause for a heightened concern.