

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE,)
)
 v.)
)
 TRACY A. REED,)
 (ID. No. 0209004399))
)
 Defendant.)

Submitted: January 16, 2004
Decided: April 21, 2004

Maria O. Graham, Esq., Department of Justice, Dover, Delaware. Attorney for State.

Sandra Dean, Esq., Public Defender's Office, Dover, Delaware. Attorney for Defendant.

*Upon Consideration of the Defendant's Motion To
Determine Competency*
DEFENDANT DETERMINED TO BE COMPETENT

VAUGHN, Resident Judge

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OPINION

The defendant, Tracy A. Reed, is charged with Robbery in the First Degree, Attempted Robbery in the First Degree, Burglary in the Second Degree, Resisting Arrest and Criminal Mischief. It is alleged that on or about September 6, 2002, the defendant entered a dwelling at 24 N. Queen Street, Dover, Delaware, and, while therein, robbed one person and attempted to rob another. During the course of these offenses, he allegedly damaged the dwelling. A short time later he allegedly resisted arrest while being apprehended by the police.

At the request of the defense, a hearing was held to determine whether the defendant is competent to stand trial. In this order, I limit myself to a consideration of that issue.

I

The test of competency to stand trial is set forth at 11 *Del. C.* § 404(a) as follows:

Whenever the court is satisfied, after hearing, that an accused person, because of mental illness or mental defect, is unable to understand the nature of the proceedings against the accused, or to give evidence in the accused's own behalf or to instruct counsel on his behalf, the court may order the accused person to be confined and treated in the Delaware Psychiatric Center until the accused person is capable of standing trial.

This standard, in addition to its plain language, has been construed to require that a defendant be able (1) to consult with defense counsel rationally, (2) to assist

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in preparing his defense, and (3) to have both a rational and factual understanding of the proceedings against him.¹ In determining competency, a court must consider all of the circumstances, and base the decision upon the facts of the particular case.² Competency does not necessarily turn upon the absence or presence of any particular factor. The burden is upon the State to establish the defendant's competency by a preponderance of the evidence.³

II

At the hearing, testimony was received from two experts, Dr. Kathryn M. Sheneman and Dr. Abraham J. Mensch, both of whom are psychologists. Dr. Sheneman examined the defendant at the Delaware Psychiatric Center. In reaching her conclusions, she relied both on her examination and previous examinations performed by Dr. Crista McDaniel, also of the Delaware Psychiatric Center. Dr. McDaniel is no longer with the Center and has moved outside the jurisdiction. Dr. Mensch examined the defendant at the request of defense counsel. He was provided with the record of Dr. McDaniel's earlier examinations. Various documents were also submitted to the Court after the hearing.

All three of the psychologists agree that the defendant's condition is one of mild mental retardation. Intelligence testing by Dr. McDaniel found that the

¹ *State v. Reyes*, Del. Super., Cr.A. Nos IN98-08-1664, 1665, Alford, J. (Apr. 28, 2000); *State v. Shields*, 593 A.2d 986, 1010 (Del. Super. 1990).

² *Shields*, 593 A.2d at 1005.

³ *Diaz v. State*, 508 A.2d 861, 863 (Del. 1986).

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defendant functions in the intellectually deficient range with a Full Scale IQ of 64, Verbal IQ of 62, and Performance IQ of 74.

In her initial report, Dr. McDaniel concluded that "due to Mr. Reed's limited intellect and particularly, his limited verbal comprehension, that his ability to proceed in this matter is marginal at best." A little over a month and a half later, however, Dr. McDaniel saw the defendant again for the purpose of administering a test known as the Competency Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR). This test is one which was developed specifically to assist in assessing a mentally retarded person's competency to stand trial. She concluded that the defendant's results on this test "placed Mr. Reed well within the competent range." Her opinion was that the results indicated that the defendant's understanding of the proceedings against him was greater than his ability to verbalize that understanding. As a result of this second interview with Mr. Reed, she revised her opinion, finding that "Mr. Reed has demonstrated at least a minimally adequate ability to proceed in this matter."

During Dr. McDaniel's initial examination of the defendant, she recorded his explanation of the circumstances which led to his arrest as follows:

I robbed somebody. I took forty dollars. I didn't know it was happening. I didn't realize I had done it until it wore off. I was on crack. I didn't realize what I was doing until the police. The person I robbed called the police. They arrested me in Dover on Queen's Street. I was so scared I ran and they caught me. I was just frightened. I realized I had did something wrong when they came and took me. I know I had done it, but I couldn't realize I

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was going to go that far. I got bit by a K-9 on my leg and went to the hospital. I stayed in the hospital. I went to the police station and was fingerprinted. They kept me – asked questions. They took me to Smyrna until my court date and they kept me for eight weeks. I got bailed out. When I went to court I seen him (his lawyer) when I went down to the court building. I saw him last week – Lloyd Schmidt about three weeks after I had an evaluation.

When Dr. Sheneman examined the defendant, she re-administered the CAST-MR test. The defendant's score was almost the same as his first score. She observed that while Mr. Reed's expressive language is impoverished, and suggestive of concrete concept formation, he can read reasonably well, albeit with uncertain comprehension. She also observed that he has very controlled speech. These features, she stated, are atypical of persons commonly diagnosed with mental retardation. She indicated that they do not contradict the diagnosis, but merely make unclear the etiology of the condition. She also observed that Mr. Reed has a desire to please which may cause him to say he understands something when he does not. Defense counsel, she indicated, should speak to Mr. Reed using concrete and simple sentences, and should, where appropriate, have Mr. Reed confirm his understanding through responses to counsel's questions or statements.

Dr. Sheneman reviewed the 20 factors sometimes referred to as the *Shields* factors.⁴ In her opinion, the defendant has sufficient mental capacity to appreciate his presence in relation to time, place, and things; understands that he will be in a

⁴ *Shields*, 593 A.2d at 1010-1111.

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court of law charged with a criminal offense; realizes there will be a judge on the bench; understands there will be a prosecutor and a defense attorney and the roles of each; knows he will be expected to tell his lawyer all he knows or remembers about the events involved in the alleged offenses; understands there will be a jury present which will pass upon evidence in determining his guilt or innocence (although his ability to assist in jury selection beyond an elementary level is impaired by his condition); has sufficient memory to relate answers to questions posed to him; has rapport with his attorney; has the ability to meet stresses without his rationality or judgment breaking down; has contact with reality; has the minimum intelligence necessary to grasp the events taking place; can divulge facts without paranoid distress; can testify, if necessary (and, in fact, has preliminarily decided not to testify); can make simple decisions; and has a desire for justice rather than undeserved punishment.

With respect to the remaining *Shields* factors, she expressed the following caveats. In her opinion the defendant's intellectual limitations will impair his ability to follow testimony. She explained there will be times that he will be able to follow testimony and times that he will not. She further explained that the defendant reasons at a simple and concrete level, and that for the defendant to understand and follow the testimony it should be presented in concrete and simple terms. She further explained, however, that the defendant does have the presence of mind to know to ask his attorney to explain something when he is having difficulty understanding it, and told her that he would do so. It was her opinion that this issue is not an insurmountable problem and that it is characteristic of

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persons with mild mental retardation and, even to some extent, people of average intellect. Dr. Sheneman was also of the opinion that the defendant can confer coherently with and assist his attorney, but lacks the sophistication of intellect to provide any real help in the development of legal strategy, although he can participate in developing legal strategy to a limited extent. She further explained that the defendant's decisional limitations will impair his ability to evaluate potential legal defenses or witnesses who may be called, and reliance upon his attorney will be necessary, but he can assist in those areas. Similarly, she was of the opinion that he can give and receive advice from his attorney, but the attorney will have to converse with him in concrete and simple terms. She was also of the opinion that he will need the assistance of his attorney in evaluating any plea offer. As to this latter issue, during his first interview with Dr. McDaniel the defendant stated that he was hoping to get probation and, when asked about other possible outcomes associated with his charges, replied "Two years (in jail)."

Based upon her review of Dr. McDaniel's work, the scores on the tests administered, and her own interviews of the defendant and the defendant's aunt, Dr. Sheneman concluded that "Mr. Reed has the capacity to proceed in the legal matters relative to these particular criminal charges."

Dr. Mensch also performed intelligence testing upon the defendant with the following results: Verbal IQ was 55; Performance IQ was 72; and Full Scale IQ was 62. He found that the defendant's understanding of word meanings and verbal expressive ability is that of a child six years, ten months of age; his word recognition skills those of a 2nd grader; his nonverbal, spatial reasoning that of a

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child ten years, ten months of age; and his ability in terms of fluid reasoning or abstract reasoning that of a child six years, two months of age. Dr. Mensch found the defendant to have poor working memory, which refers to his ability to hold an idea long enough to complete a task. In laymen's terms, poor working memory might be characterized as an inability to remember twenty minutes later information that one absorbed twenty minutes ago. He also found that the defendant is poor at being able to handle more than one idea at a time and has poor problem solving ability.

Dr. Mensch also stated that, according to psychological literature, the CAST-MR is subject to certain caveats, including that the study upon which the test was developed included subjects having mental retardation who had not been charged with any criminal offenses, which would make it questionable as to how they would answer certain parts of the test; that a high score on the CAST-MR by a person with mental retardation is not necessarily an indicator that the person has competence-related abilities comparable to those of non-retarded defendants; and, since the test is 80 percent multiple choice, a defendant can be expected to get a substantial number of points by sheer guessing.

When asked by Dr. Mensch what he was charged with, the defendant responded that he was charged with robbery. He realized the charges were serious. He explained the circumstances as follows:

It was a mistake, but it won't happen no more. Something I should not done. I went and robbed someone in a house on Queen Street last year in September. I took a wallet out of a man's pocket. I didn't

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know him, but I didn't hurt anybody. I did it because I was on crack cocaine – it makes you do what you don't mean to do."

Dr. Mensch administered the Competency Assessment Interview (CAI), also known as the McGarry factors.⁵ These factors test the defendant's ability to consider realistically possible legal defenses, manage his behavior to avoid trial disruptions, relate to his attorney, participate with his attorney in planning legal strategy, understand the roles of various participants in the trial, understand court procedure, appreciate the charges, appreciate the range and nature of possible penalties, perceive realistically the likely outcome of the trial, provide his attorney with available pertinent facts concerning the offenses, challenge prosecution witnesses, testify relevantly, and be motivated toward self-defense.

Dr. Mensch testified that he believes the defendant has an adequate ability to control his behavior and relate to his attorney, and an adequate understanding of the roles of the various participants in the trial and court procedure. He has an adequate appreciation of the charges. As to the range and nature of possible penalties, the defendant believed that if found guilty of the charges he will receive two to five years. The defendant has a realistic perception of the outcome of the trial. Dr. Mensch found that the defendant does not desire undeserved punishment. Dr. Mensch's report seems to indicate that the defendant has an adequate ability to challenge prosecution witnesses.

⁵ See *Shields*, 593 A.2d at 1000, f.23 .

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Dr. Mensch found that the defendant does not do very well, however, in his ability, realistically, to consider possible legal defenses, participate with his attorney in planning legal strategy, provide his attorney with available pertinent facts concerning the alleged offenses, and testify relevantly. He attributes the defendant's shortcomings in these areas to poor judgment, poor working memory, poor problem solving ability, and poor language skills.

Dr. Mensch also considered the *Shields* factors. As to those, he concluded that the defendant has sufficient mental capacity to appreciate his presence in relation to time, place and things, has an elementary awareness that he will be in a court of law charged with criminal offenses, realizes there will be a judge on the bench, understands there will be a prosecutor present who will be trying to convict him, understands that he will have a lawyer who will defend him against the charges, knows that he will be expected to tell his attorney all he knows or remembers about the events involved in the alleged offenses and has the ability to do so, has a basic appreciation that there will be a jury present at trial which will pass upon evidence in determining his guilt or innocence, has established rapport with his attorney, has the ability to meet stresses without his rationality or judgment breaking down, can divulge facts without paranoid distress, can make simple decisions and has a desire for justice rather than undeserved punishment.

Dr. Mensch found that the defendant does not satisfy several of the *Shields* factors, however. As to whether the defendant has sufficient memory to relate answers to questions posed of him, Dr. Mensch found that Mr. Reed has significant limitations in memory and receptive/expressive language skills needed to recall or

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adequately answer questions posed to him, except at a most basic level. As to the defendant's ability to follow testimony reasonably well, Dr. Mensch found that Mr. Reed evidences significant intellectual limitations that impede his ability to follow testimony reasonably well, primarily due to his mental retardation. With regard to the defendant's contact with reality, Dr. Mensch concluded that Mr. Reed's mental retardation limits his ability to fully appreciate "adult" reality, as opposed to "child" reality. As to minimum intelligence necessary to grasp events taking place, Dr. Mensch found that Mr. Reed has limitations in this regard, particularly without additional assistance to explain to him events that have transpired, as well as to ensure that he has comprehended what he has heard. Concerning his ability to confer coherently with some appreciation of the proceedings, Dr. Mensch found that Mr. Reed evidences significant intellectual and judgmental deficits that are likely to impede his ability to confer with his attorney. As to his ability both to give and receive advice from his attorney, Dr. Mensch found that Mr. Reed has intellectual handicaps that would limit his ability to give or receive advice from his attorney independently and consistently. As to the defendant's ability to decide upon a plea, Dr. Mensch concluded that Mr. Reed does not consistently possess the independent decision-making and intellectual capabilities necessary to make an informed, rational decision upon a plea that would serve his best interests, primarily due to the cognitive limitations placed on him by his mental retardation. And finally, with regard to the defendant's ability to testify, Dr. Mensch concluded that Mr. Reed evidences limitations in the receptive and expressive language capability to testify, as well as the judgmental and intellectual capacity to

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recognize the relevance, accuracy or possible self-injurious impact of some testimony.

Dr. Mensch observed that Dr.'s McDaniel and Sheneman saw some of the same deficits in the defendant as he did, but he saw them as more gravely affecting the defendant's capacity in a trial proceeding. Dr. Mensch's opinion is that "there are significant intellectual, language, working memory, and problem solving deficits that limit Mr. Reed's ability to follow testimony and other court proceedings reasonably well, make decisions and weigh alternatives presented to him, and otherwise assist his attorney in his defense."

III

The following part from Judge Barron's analysis in *State v. Shields* provides context for the application of the standard of competency set forth above:

The Court is mindful that due process requires that a defendant be competent to stand trial, *Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966), and understands that the placement of an incompetent defendant before a jury on the issue of guilt or innocence does not reflect "a reasoned interaction between an individual and his community" but rather societal "invective against an insensible object." [Footnote omitted.] At the same time "due process requires that the defendant be afforded a fair, not a perfect trial, and that he be able to consult with his lawyer with a reasonable, not a perfect degree of rational understanding." *State v. Wynn*, Del. Super., 490 A.2d 605, 610 (1985). As one Court noted:

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Competency is, to some extent, a relative matter arrived at by taking into account the average level of ability of criminal defendants. We cannot, however, exclude from trial all persons who lack the intelligence or legal sophistication to participate actively in their own defense. That is not the standard by which we measure competency. Should we do so, we would preclude the trial of a number of people who are, indeed, competent to stand trial as understood in the law. The accused need not understand every legal nuance in order to be competent. . .

State v. Guatney, 207 Neb. 501, 299 N.W. 2d 538 (1980).

In this case, when the evidence is considered as a whole, it is clear that the defendant understands the nature of the proceedings against him. None of the psychologists seemed to have any real doubt or reservation about this element of competency. Virtually all of the evidence from all three supports that conclusion.

The issues are whether the defendant is competent to give evidence on his own behalf, instruct counsel on his own behalf, consult with defense counsel rationally, and assist in preparing his defense. These elements of competency require that the defendant have the capacity, at least at an elementary level, to understand that he may testify on his own behalf if he wishes to do so, but cannot be compelled to do so; that he have the capacity to testify rationally; that he be able to confer with and assist his lawyer by providing information and responding to counsel's questions, and that he be able to agree, at least at an elementary level, on

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the choice of a defense. It is not necessary that the defendant be able to provide significant input in jury selection or engage in legal analysis or the development of legal strategy. That is what the attorney is for.

In this case, it does not appear that there will be numerous witnesses. It appears there will only be a few in the State's case. Based upon the testimony of Dr. Sheneman, I find that the limitations on the defendant's ability to follow testimony can be addressed through the taking of frequent recesses during which the defendant and his attorney can review the testimony. I also find that, if there are relevant defense witnesses, the defendant has the capacity to so inform counsel. I also find that the defendant can inform his counsel as to the facts and circumstances surrounding the alleged offenses. The accounts which he gave to the psychologists, although brief, are reasonably lucid and were not followed by a search for detail that would be typical of questions defense counsel would ask his client. I also find that the defendant can confer with and assist his attorney in preparing a defense. I accept the testimony of Dr. Sheneman that the defendant can testify on his own behalf, if he chooses to do so.

After considering all of the evidence, I find that the defendant is mentally competent to stand trial. I recognize that such things as the specific elements of the offenses charged, the range of penalties associated with each, the plea bargaining process and details of the proceedings will have to be explained to the defendant with patience and in concrete and simple terms. The fact that matters will have to be explained to the defendant thoroughly and in concrete and simple terms, however, does not mean that he is not competent.

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In order to better ensure that the defendant understands the proceedings, the presiding judge should conduct the trial at a deliberate pace and allow defense counsel frequent recesses, at counsel's request, so that he may review the proceedings with his client.

IT IS SO ORDERED.

Resident Judge

oc: Prothonotary
cc: Order Distribution
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