FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-1237

ROBERT ADDISON III,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Petition for Writ of Certiorari—Original Jurisdiction.

November 17, 2021

PER CURIAM.

Petitioner seeks certiorari review of orders denying a court-ordered expert competency evaluation and adjudicating Petitioner competent to proceed. Because we conclude that the trial court departed from the essential requirements of law in failing to appoint an expert to conduct a competency evaluation after finding reasonable grounds existed to question Petitioner's competency, we grant the petition and quash the orders.

I.

After Petitioner was charged with battery on an emergency medical care provider, defense counsel filed a "Suggestion of Mental Incompetence to Proceed" pursuant to Florida Rule of

Criminal Procedure 3.210 based on the following: (1) Petitioner "was under Baker Act when he was arrested in this case"; (2) Petitioner was previously found incompetent to proceed; and (3) Petitioner did not appear to understand the concept of negotiation and was unable to aid in the preparation of his defense. Defense counsel requested that the court appoint one or more psychiatrists or psychologists to determine Petitioner's mental competence.

The trial court held a hearing during which defense counsel asserted that the court had a duty to appoint a neutral expert to evaluate Petitioner's competency because there were reasonable grounds to suspect that Petitioner was not competent. The court took issue with defense counsel's position that the court was required to appoint an expert—which would be paid by the court system—as opposed to the defense hiring an expert to conduct the competency examination—which would be paid by the public defender's office. Defense counsel responded that "[t]he issue for competency is so material, it's so fundamental, that it's incumbent upon the court to resolve this issue and the Court is on notice about this." Defense counsel also explained:

> [T]he issue with this is that competency is a concern for all parties. Competency is a concern for the State, it's a concern for the P.D., it's a concern for the court system as to whether or not this person can freely and voluntarily enter a plea.

When the court inquired if it could hold a competency hearing while denying the motion to appoint an expert, defense counsel responded that the court was required to both appoint an expert and hold a hearing. The trial court took the matter under advisement.

At a subsequent hearing, the trial court orally announced that it was denying defense counsel's request to appoint an expert to evaluate Petitioner's competency. The court explained:

> This is still an adversarial process, and the Court's job is not to get involved in presenting evidence on behalf of criminal defendants. That's the part of the—that's the burden of the attorneys. Now, I'm not going to get

> involved in appointing experts to evaluate the defendant for the first time which I independently have no basis to have him evaluated. If the defense wants to have him evaluated, that is their prerogative, and I am more than willing and happy to have a competency hearing at the parties' convenience.
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> . . . .
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> Now, I'm sitting here and saying I'm ready for a competency hearing when the parties are ready for a competency hearing. It's not my job to hire an expert to evaluate a defendant as the first expert involved in the case. The case law makes clear that if you want me to evaluate somebody, if you want me to appoint somebody to evaluate them, you need to pay for it, and your office—if you're telling me that you're willing to take on that cost, I'm willing to enter an order saying the Public Defender has—the Public Defendant's Office will pay for John Smith or whoever else you want to evaluate [Petitioner], but you haven't told me you're willing to do that, so I'm not willing to enter an order taking on the burden of the cost of it.

At a third hearing, defense counsel objected to the trial court holding a competency hearing because the court declined to appoint an expert to evaluate Petitioner. Defense counsel argued that reasonable grounds were presented to the court to question Petitioner's competency, citing Petitioner's Baker Act proceedings, the previous findings of Petitioner's incompetence to proceed in other cases, and defense counsel's concerns about Petitioner's ability to understand the proceedings. When the State indicated that it agreed with the court that it was the defense's burden to prove incompetency, defense counsel reiterated that because the defense presented reasonable grounds to question Petitioner's competence to proceed, it was the court's duty to appoint an expert to evaluate Petitioner's competency. At the court's direction, the parties submitted memoranda on the issue.

The trial court subsequently issued an "Order on Defendant's Suggestion of Mental Incomptency [sic] and Objecting to

Comptency [sic] Hearing." Although it acknowledged that "**reasonable grounds exist to believe the defendant is not mentally competent to proceed**," the court denied the motion for a court-appointed expert because rule 3.210 stated that the court "may order the defendant to be examined," but did not require it. (Emphasis added).

When the parties appeared before the court to reschedule the competency hearing, Petitioner interrupted the court and defense counsel, and the court admonished Petitioner to be quiet. Petitioner asked the court questions about his wallet and the commissary, expressed confusion about his competency, and indicated that he had been in a car accident. At that point, the court muted Petitioner's Zoom microphone and passed the case to a later date.

When the parties again appeared before the court for a competency hearing, no witnesses were called to testify. Defense counsel argued that Petitioner was incompetent to proceed because Petitioner had been committed under the Baker Act twice in 2020, was under the Baker Act when he committed the charged offense, did not understand plea negotiations with the State, and was unable to help in the preparation of his defense. When the State responded that there was a lack of evidence to support a finding of incompetency, defense counsel noted that there was no expert testimony because the trial court denied the motion to appoint an expert. The trial court found Petitioner competent to proceed because Petitioner was presumed competent and neither party presented evidence to prove Petitioner did not have the present ability to consult with his attorney with a reasonable degree of rational understanding.

Afterwards, the trial court entered a written order adjudicating Petitioner competent to proceed based on the lack of evidence of incompetency to overcome the presumption of competency. The court further noted:

> Lastly, the defense also made an argument that the Court's failure to appoint an expert to evaluate the Defendant is the reason why the defense did not have evidence or a medical expert to present at the competency

> hearing. First, the defense may retain its own expert at any time it chooses. More importantly, the Court did not have independent reasonable grounds to believe the defendant may not have the sufficient present ability to consult with his attorney and aid in the preparation and presentation of his defense. At various court hearings, although limited in interaction, [Petitioner] spoke on the record and appeared to understand the nature of the proceedings. He answered and responded to questions and knew when to listen and respond to questions from counsel and the trial court. At this stage of the proceedings, he does not present any reasonable grounds for the Court to believe he does not have a rational understanding of the proceedings.

This petition followed.

II.

"It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171 (1975). "[T]he failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Id.* at 172. "If the trial court is presented with reasonable grounds to believe that the defendant may not have the sufficient present ability to consult with his attorney and aid in the preparation and presentation of his defense, the trial court must order a hearing **and** examination." *Brockman v. State*, 852 So. 2d 330, 333 (Fla. 2d DCA 2003) (emphasis added).

> While it is true that **due process demands that a criminal defendant be psychiatrically evaluated if there is reason to doubt his competency**, *Scott v. State*, 420 So. 2d 595 (Fla. 1982), there is no constitutional right to two evaluations. In *Drope v. Missouri*, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975), a statute requiring only one expert psychiatric

> evaluation was declared "constitutionally adequate to protect a defendant's right not to be tried while legally incompetent." *Id.* at 173, 95 S. Ct. at 904.

D'Oleo-Valdez v. State, 531 So. 2d 1347, 1348 (Fla. 1988) (emphasis added).

"In evaluating the defendant's competence to stand trial, the appointed experts shall consider 'whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational, as well as factual, understanding of the pending proceedings.'" *Losada v. State*, 260 So. 3d 1156, 1162 (Fla. 3d DCA 2018) (quoting Fla. R. Crim. P. 3.211(a)(1)). "After the competency hearing, the trial court must make its own 'independent legal determination regarding whether the defendant is competent, after considering the expert testimony or reports and other relevant factors.'" *Id.* (quoting *Shakes v. State*, 185 So. 3d 679, 682 (Fla. 2d DCA 2016)).

In this case, Petitioner seeks certiorari relief on the ground that the trial court departed from the essential requirements of law in adjudicating him competent to proceed without appointing an expert to conduct a competency examination. Specifically, he asserts that the trial court violated due process when it denied his motion for a court-appointed expert after finding that reasonable grounds existed to question his competency to proceed. Certiorari review is proper where an order implicates a violation of constitutional rights that cannot be remedied on plenary appeal. *Baird v. Mason Classical Acad., Inc.*, 317 So. 3d 264, 267 (Fla. 2d DCA 2021). Petitioner's due process claim is properly raised in a petition for writ of certiorari. *See Carrion v. State*, 859 So. 2d 563, 565 (Fla. 5th DCA 2003) (holding that certiorari was an appropriate remedy for defendant's due process claim that the trial court failed to follow prescribed procedures once it determined that reasonable grounds existed to question defendant's competency to stand trial).

In denying the appointment of an expert to conduct a competency evaluation, the trial court relied on Florida Rule of Criminal Procedure 3.210, which provides in pertinent part:

> **(b) Motion for Examination.** If, at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition, which shall be held no later than 20 days after the date of the filing of the motion, and may order the defendant to be examined by no more than 3 experts, as needed, prior to the date of the hearing. Attorneys for the state and the defendant may be present at any examination ordered by the court.

Clearly, this rule contemplates that the trial court has discretion as to the number of experts it may appoint to conduct a competency examination provided that it does not exceed three. *See Tita v. State*, 42 So. 3d 838, 840 (Fla. 4th DCA 2010). However, it does not give the trial court unbridled discretion to deny the appointment of an expert where this would violate the defendant's constitutional right to due process.

The Florida Supreme Court has expressly recognized that a defendant has a due process right to a court-ordered expert examination if there is reason to doubt the defendant's competency. *D'Oleo-Valdez*, 531 So. 2d at 1348. A similar due process right has been recognized by the federal courts. *See Ake v. Oklahoma*, 470 U.S. 68, 86 (1985) (holding that the defendant had a due process right to the appointment of a competent psychiatrist to conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defendant's insanity defense); *Walker v. Att'y Gen. for Okla.*, 167 F.3d 1339, 1348–49 (10th Cir.) (extending *Ake* to pretrial competency proceedings), *cert. denied*, 528 U.S. 987 (1999); *United States v. Williams*, 998 F.2d 258, 264 (5th Cir. 1993) (recognizing that the threshold due process standard for the grant of a mental examination on competence to stand trial is similar to that applicable to the grant of a mental examination focusing on sanity at the time of the offense); *see also Cacoperdo v. Demosthenes*, 37 F.3d 504, 510 (9th Cir. 1994) (noting that due process does not

require a court to order a psychiatric evaluation unless the court had a good faith doubt concerning the defendant's competence). Furthermore, section 916.115(1), Florida Statutes, provides that "[t]he court **shall appoint** no more than three experts to determine the mental condition of a defendant in a criminal case, including competency to proceed, insanity, involuntary placement, and treatment." (Emphasis added). This mandatory language necessarily contemplates the appointment of at least one expert. Thus, examination by at least one court-appointed expert will be required if there is reason to doubt a defendant's competency.

Here, the trial court denied the appointment of an expert because it believed that the cost of an expert examination should not be borne by the court and that the appointment of an expert would improperly involve the court in an adversarial proceeding. No authority supports the proposition that cost concerns can justify dispensing with Petitioner's due process right to examination by at least one-court-appointed expert. In fact, such concerns are improper under section 916.115(2), Florida Statutes, which requires the court to pay for a competency evaluation upon granting a court appointment, regardless of who requested it. Moreover, the appointment of an expert does not improperly involve the trial court in an adversarial proceeding because the court has more than a passive role in ensuring that a criminal defendant is competent to proceed. *See Lane v. State*, 388 So. 2d 1022, 1025 (Fla. 1980) ("The law is now clear that the trial court has the responsibility to conduct a hearing for competency to stand trial whenever it reasonably appears necessary, whether requested or not, to ensure that a defendant meets the standard of competency . . . ."); *Bracero v. State*, 10 So. 3d 664, 666 (Fla. 2d DCA 2009) ("Judges have an independent obligation to order a competency evaluation under Florida Rule of Criminal Procedure 3.210(b) when the court has reasonable ground to believe a criminal defendant is not mentally competent to proceed during a material stage of a criminal proceeding.").

Once the trial court found that there were reasonable grounds to believe that Petitioner might not be mentally competent to proceed, Petitioner had both a due process and statutory right to the appointment of an expert at court expense to conduct a competency examination. The trial court violated that right by

holding a competency hearing without appointing an expert to conduct an examination. In its order adjudicating Petitioner competent to proceed, the court found that no evidence was presented to overcome the presumption of competence. However, this lack of evidence was the result of the court's refusal to appoint an expert to conduct a competency examination. The court further found that the court had no "independent" basis to believe that Petitioner may not have the sufficient present ability to consult with his attorney and aid in the preparation and presentation of his defense, noting that "[a]t various court hearings, although limited in interaction, [Petitioner] spoke on the record and appeared to understand the nature of the proceedings." The transcripts of the various hearings do not support this observation. In fact, there is nothing to show that the trial court conducted any colloquy with Petitioner addressing his competency to proceed. In light of the above, the trial court could not find Petitioner competent. *See Brockman*, 852 So. 2d at 333–34.

In adjudicating Petitioner competent to proceed, the trial court departed from the essential requirements of law resulting in material injury that cannot be remedied on direct appeal. Because there are reasonable grounds to doubt Petitioner's competency, Petitioner cannot make the crucial decision whether to enter a plea or proceed to trial until the trial court has made a proper determination that Petitioner is competent to proceed after considering an expert competency evaluation. The trial court's failure to make a proper competency determination prior to plea negotiations cannot be remedied on direct appeal from a conviction. The mere existence of a mechanism for correcting the error via post-judgment appeal is not determinative; rather, the remedy must alleviate the immediate constitutional harm resulting from the error. *See Baird*, 317 So. 3d at 267–68. In the absence of an expert competency evaluation, there would be no evidence to permit a retrospective competency determination. *See Carrion*, 859 So. 2d at 565. Accordingly, we grant the petition and quash the trial court's order denying a competency evaluation by a court-appointed expert and its order adjudicating Petitioner competent to proceed.

Petition GRANTED and orders QUASHED.

JAY, M.K. THOMAS, and LONG, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Charlie Coffer, Public Defender, and Elizabeth H. Webb, Assistant Public Defender, Jacksonville, for Petitioner.

Ashley Moody, Attorney General, and David Welch, Assistant Attorney General, Tallahassee, for Respondent.