

Third District Court of Appeal

State of Florida

Opinion filed December 26, 2019.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D18-1747, 3D17-2012
Lower Tribunal No. 16-9990

Gregory Alexander,
Appellant,

vs.

The State of Florida,
Appellee.

Appeals from the Circuit Court for Miami-Dade County, Miguel M. de la O,
Judge.

Carlos J. Martinez, Public Defender, and James Odell, Assistant Public
Defender, for appellant.

Ashley Moody, Attorney General, and David Llanes, Assistant Attorney
General, for appellee.

Before LINDSEY, HENDON, and MILLER, JJ.

HENDON, J.

Gregory Alexander appeals from a judgment and sentence for strong-arm robbery. We reverse and remand for a new trial.

I. Facts and Procedural History

In June 2016, Mr. Alexander was charged by information with strong-arm robbery. The arrest affidavit reflects that in May 2016, Mr. Alexander approached the victim, represented himself as an ex-law enforcement officer and an ex-animal control officer, and then proceeded to tell the victim that he did not like the way the victim was walking his dog. Mr. Alexander told the victim that he had a gun, took the victim's dog away, forced the victim to pay a "fine" of slightly over \$100 at the scene, and forced the victim to read something out loud while Mr. Alexander was videotaping the victim. Mr. Alexander released the victim's dog when the victim screamed to a nearby person. Following the incident, Mr. Alexander posted the video of the victim on social media. Mr. Alexander was subsequently arrested and charged with the strong-arm robbery.

In July 2016, the trial court entered orders appointing two psychologists, Dr. Jethro Toomer and Dr. Rose Huber, to perform competency evaluations of Mr. Alexander. Both psychologists examined Mr. Alexander the following month and issued their reports finding that Mr. Alexander was competent to proceed to trial. The reports note that Mr. Alexander has been diagnosed with a bipolar disorder but was not taking medications for the disorder. Both Dr. Toomer and Dr. Huber

expressed concerns because Mr. Alexander was not taking medications for his bipolar disorder. Dr. Toomer's report provides: "Given that he is not following a regimen of medication, monitoring is required with respect to any likely decompensation that may be associated with his participation in the legal proceedings." Dr. Huber's report reflects: "Mr. Alexander has a serious mental illness of Bipolar disorder which can be managed to some degree with psychotropic medication. However, he is currently not [being] prescribed psychotropic medication and therefore his delusions and mood are not stable."

At a hearing conducted on August 29, 2016, the trial court stated that Mr. Alexander "presents very lucid in court." Thereafter, the parties stipulated that Dr. Toomer and Dr. Huber would testify consistent with their reports. The trial court, however, did not make any findings or enter an order as to Mr. Alexander's competency.

In November 2016, the trial court appointed two other psychologists to perform competency evaluations of Mr. Alexander, Dr. Michael Jochananov and Dr. Barton Jones. Dr. Jochananov submitted a letter indicating that he unsuccessfully attempted to examine Mr. Alexander, because the detention center was on "lock down." Dr. Jones issued a report indicating that Mr. Alexander was competent to proceed, but his report did not address whether Mr. Alexander has any mental illnesses.

At a hearing conducted on November 21, 2016, the trial court stated that it could not make the competency determination until it had the second report, and the matter was reset for November 28, 2016. A review of the hearing transcript indicates that the trial court did not make a competency determination, and a review of the record reflects that the trial court did not enter an order as to Mr. Alexander's competency. Nonetheless, the docket sheet erroneously states that the trial court had made a competency determination.

At a subsequent hearing conducted on June 16, 2017, the trial court conducted a Faretta¹ hearing following Mr. Alexander's request to proceed pro se. During the hearing, Mr. Alexander denied having any "mental issues." Upon completion of the Faretta hearing, the trial court granted Mr. Alexander's request to proceed pro se.

In mid-August 2017, Mr. Alexander proceeded to trial representing himself with standby counsel.² The jury found the defendant guilty as charged. The trial court denied Mr. Alexander's motion for new trial.

Mr. Alexander agreed to have counsel represent him at sentencing. Mr. Alexander's sentencing counsel "obtained hundreds and hundreds of documents

¹ Faretta v. California, 422 U.S. 806 (1975).

² Another circuit court judge entered the orders appointing the experts to examine Mr. Alexander, conducted the hearings on August 29, 2016 and November 21, 2016, and conducted the Faretta hearing. Judge de la O, however, presided over Mr. Alexander's trial and sentencing hearing.

from DCF, from DJJ” that indicated there was an “abundance of mental health records that were unbeknownst” to the parties. Following the sentencing hearing, Mr. Alexander was sentenced to a minimum/mandatory prison term of fifteen years as a prison releasee reoffender.

II. Analysis

On appeal, Mr. Alexander contends the trial court erred by failing to make an independent competency determination prior to trial. We agree.

“Once [a] trial court appoint[s] doctors to undertake competency evaluations of [a defendant], the trial court [is] obligated to make its own independent competency determination.” Aquino v. State, 44 Fla. L. Weekly D2750, *3 (Fla. 3d DCA Nov. 13, 2019) (citing Baker v. State, 221 So. 3d 637, 639-40 (Fla. 4th DCA 2017)). The State concedes the trial court did not make an independent competency determination at the hearing conducted on November 21, 2016, but argues the trial court made such a determination at the hearing conducted on August 29, 2016. The State’s argument is based on the trial court’s comment that Mr. Alexander “presents very lucid in court.” The State’s argument is unpersuasive. First, the statement was made before the trial court could have made a competency determination because the parties had not yet stipulated that the experts would testify consistent with their reports. Second, the fact that the trial court believed Mr. Alexander “presents very lucid in court” cannot be

characterized as a finding of competency because a determination of competency is based on numerous relevant factors, not on whether a defendant presents as “very lucid in court.” See Fla. R. Crim. P. 3.211(2). Thus, we agree with Mr. Alexander that the trial court erred in failing to make an independent determination of competency. See Auerbach v. State, 273 So. 3d 134, 137 (Fla. 3d DCA 2019) (“In lieu of live testimony, however, the parties can stipulate that the expert witnesses, if called to testify at the hearing, would testify consistent with their written reports. [Dougherty v. State, 149 So. 3d 672, 676 (Fla 2014)]. Importantly, the parties are not ‘stipulating’ to competency. It remains for the trial court to make an independent legal determination of the defendant’s competency in consideration of ‘the expert testimony or reports and other relevant factors.’ Moulton v. State, 230 So. 3d 934, 937 (Fla. 2d DCA 2017) (quoting Dougherty, 149 So. 3d at 678).”). Thus, because the trial court failed to make the required independent competency determination, we reverse.

Next, we must decide whether, on remand, we should instruct the trial court to (1) conduct a new trial if Mr. Alexander is later deemed competent at a new competency hearing, or (2) conduct a nunc pro tunc competency hearing based on the evidence available at the time of trial. Based on the record before this Court, we are compelled to reverse and remand for a new trial because a nunc pro tunc competency hearing would not ensure that Mr. Alexander’s constitutional due

process rights are met. In addition to the fairly large gap between Dr. Toomer's and Dr. Huber's evaluations of Mr. Alexander and the date of trial, both experts expressed concerns related to Mr. Alexander not being medicated for his bipolar disorder. The record does not reflect that Dr. Toomer and Dr. Huber examined or observed Mr. Alexander contemporaneous with trial, which would allow them to offer pertinent evidence at a retrospective competency hearing. See Auerbach, 273 So. 3d at 139-40 ("As the Florida Supreme Court reaffirmed in Dougherty, 149 So. 3d at 679, a nunc pro tunc competency determination is appropriate where 'there are sufficient number of expert and lay witnesses who have examined or observed the defendant contemporaneous with trial available to offer pertinent evidence at a retrospective hearing.' (quoting Mason v. State, 489 So. 2d 734, 737 (Fla. 1986)).").

Finally, we have reviewed this Court's recent decision in Aquino, which was issued after the parties filed their briefs. In Aquino, although this Court remanded for a nunc pro tunc competency determination, Aquino and the instant case are distinguishable. In Aquino, the time span between the improper competency determination and the probation violation hearing was eleven months. In the instant case, the time span between the inadequate competency hearing and Mr. Alexander's trial was approximately the same time span. However, the instant case differs from Aquino because, in the instant case, Dr. Toomer and Dr. Huber

both noted in their reports that they were concerned that Mr. Alexander was not taking any medication for his bipolar disorder. As stated above, Dr. Toomer's report provides: "Given that he is not following a regimen of medication, **monitoring is required with respect to any likely decompensation that may be associated with his participation in the legal proceedings.**" (emphasis added). Further, Dr. Huber's report reflects: "Mr. Alexander has a serious mental illness of Bipolar disorder which can be managed to some degree with psychotropic medication. However, he is currently not [being] prescribed psychotropic medication and **therefore his delusions and mood are not stable.**" (emphasis added). Although concerned about Mr. Alexander not taking medications for his bipolar disorder, the record does not indicate that Dr. Toomer and Dr. Rose examined or observed Mr. Alexander contemporaneous with trial to address their concerns.

Accordingly, we reverse Mr. Alexander's conviction and sentence for strong-arm robbery and remand for a new trial if Mr. Alexander is later determined to be competent to proceed.

Reversed and remanded with directions.