Third District Court of Appeal

State of Florida

Opinion filed November 13, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-751
Lower Tribunal Nos. 08-20310 and 10-000631

Ignacio Aquino, Jr.,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Jose L. Fernandez, Judge.

Carlos J. Martinez, Public Defender, and Jeffrey Paul DeSousa and Shannon Hemmendinger, Assistant Public Defenders, for appellant.

Ashley Moody, Attorney General, and Jeffrey R. Geldens, Assistant Attorney General, for appellee.

Before LOGUE, SCALES and GORDO, JJ.

SCALES, J.

Ignacio Aquino, Jr. appeals two orders revoking his probation, respectively, in lower tribunal case numbers F08-20310 and F10-000631. As more fully described below, we remand to the trial court either to make a *nunc pro tunc* determination of Aquino's competence or to adjudicate Aquino's current competence anew, and, if competent, conduct a new hearing on Aquino's alleged probation violations.

I. Background

In September 2008, Aquino entered a nolo contendere plea and was found guilty of two, third-degree felony counts of child abuse without great bodily harm (case number F08-20310). The trial court withheld adjudication and sentenced him to six years of probation.

In June 2011, after Aquino entered another nolo contendere plea, the trial court found Aquino guilty of grand theft in the first degree, exploitation of the elderly, contracting without a license, and resisting arrest without violence (case number F10-000631). The trial court simultaneously revoked Aquino's probation in case F08-20310 and sentenced Aquino, in both F08-20310 and F10-000631 concurrently, to a twenty-two-month prison term to be followed by three years of probation. In the order of probation violation in F08-20310, the trial court added the special condition that Aquino should not have unsupervised contact with minor children.

In 2015, after Aquino had served the incarceration portion of his sentence and while he remained on probation in F08-20310 and F10-000631, the State charged Aquino with new criminal violations: lewd and lascivious molestation of a child between the ages of twelve and sixteen, unsupervised contact with a minor, and false imprisonment (case number F15-11935). The State also filed a "3rd Amended Affidavit Violation of Probation" seeking to revoke Aquino's probation based on these alleged new law violations.

Before the probation revocation hearing occurred, though, Aquino's counsel, during an April 26, 2017 hearing, orally requested the trial court to order a competency evaluation of Aquino.[1] The trial court appointed two doctors. Both doctors examined Aquino in early May of 2017, and pronounced him competent to proceed in the probation revocation hearing.

At a brief status hearing on May 10, 2017, attorneys for the State and Aquino advised the trial court that they had received and reviewed the two doctor evaluations of Aquino. The attorney for the State advised the trial court that the doctors had found Aquino competent to proceed; then, the attorney for the State and Aquino's attorney both stipulated to the doctors' competency determinations. There was no

[1] We note that defense counsel's request for doctor evaluations was not made by written motion. The rules contemplate a written motion by counsel. Fla. R. Crim. P. 3.210(b). An oral motion, though, is not barred by the rule. See Sheheane v. State, 228 So. 3d 1178, 1179 n.2 (Fla. 1st DCA 2017).

further discussion about Aquino's competency at this hearing or at any subsequent pre-revocation hearing. Importantly, the trial court made no finding of competency; he merely accepted counsel's stipulation as to the admissibility of the doctors' reports and the competency conclusions contained therein.

Approximately eleven months later, on March 29, 2018, the trial court conducted the probation revocation hearing. At the conclusion of this hearing, the trial court found by a preponderance of the evidence that Aquino had violated his probation by committing new law violations and entered the two orders on appeal that revoked Aquino's probation in F08-20310 and F10-000631.[2] The revocation orders resulted in the trial court sentencing Aquino to thirty-five years in prison. On April 17, 2018, Aquino filed his notice of appeal challenging the revocation orders.

Eleven days later,[3] on April 9, 2018, the trial court conducted a pre-trial hearing related to F15-11935 (Aquino's 2015 charges). At this hearing, both the

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[2] As Aquino points out in his initial brief, the trial court in both of its written orders found that Aquino failed to pay costs of supervision, and in F10-000631, the trial court's order further found that Aquino failed to pay victim restitution; however, the trial court did not take evidence to support these findings and made no related oral pronouncements. The State concedes that a remand is required to conform the probation orders to the trial court's oral pronouncements. Hernandez v. State, 254 So. 3d 1091, 1092 (Fla. 3d DCA 2018).

[3] Without objection from the State, Aquino filed supplemental records with this Court, some of which concern matters that have occurred in F15-11935 after the trial court's March 29, 2018 probation revocation hearing and the rendition of the appealed order. In fact, both Aquino and the State include some argument in their respective briefs regarding events occurring after the rendition of the challenged

attorney for the State and Aquino's attorney raised a concern about Aquino's competency to proceed to trial in F15-11935 based on their observations of Aquino at the March 29, 2018 probation revocation hearing. Again, the trial court appointed two doctors – different doctors from those who evaluated Aquino the previous year – to examine Aquino and report to the court. The first of these two evaluations, dated May 20, 2018, found Aquino not competent to proceed; two subsequent evaluations in June of 2018, though, found Aquino competent to proceed to trial in F15-11935.

On November 8, 2018, the trial court conducted a pre-trial competency hearing in F15-11935. The trial court found Aquino competent, and stated further that Aquino "was competent at the time of the probation revocation hearing."[4]

The notice of appeal in this case, filed on April 17, 2018, as amended on August 31, 2018, pertains to – and, as explained in footnote 3, *supra,* our review is limited to – the final orders of revocation of probation and the accompanying prison sentences entered in F08-20310 and F10-000631.[5]

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order. While matters occurring after the March 29, 2018 probation revocation are beyond our scope of review, see Fla. R. App. P. 9.110(h), and are irrelevant to our holding, we include these post-rendition facts for context. We express no opinion as to whether these facts may have relevance to the trial court's determinations on remand.

[4] Our review of the docket in F15-11935 reveals that the case is still pending below.

[5] Aquino's first notice of appeal to this Court, filed on April 17, 2018, referenced only the five-year sentence entered in F08-20310. His August 31, 2018 amended notice of appeal included the thirty-year sentence of F10-000631.

II. Analysis[6]

Aquino argues that the trial court erred by failing to make its own, independent competency determination prior to conducting the March 29, 2018 hearing on Aquino's probation revocation. We agree.

A. Requirement of an Independent Competency Determination by the Trial Court

A trial court must make its own determination as to competency; the doctor evaluations are advisory only. Losada v. State, 260 So. 3d 1156, 1162 (Fla. 3d DCA 2018) (citing Dougherty v. State, 149 So. 3d 672, 678 (Fla. 2014)). The trial court cannot base competency solely on the parties' stipulation, id. at 1162, and it is an abuse of the trial court's discretion to fail to make its own legal determination of competency. Id. at 1163.

Once the trial court appointed doctors to undertake competency evaluations of Aquino, the trial court was obligated to make its own independent competency determination. Baker v. State, 221 So. 3d 637, 639-40 (Fla. 4th DCA 2017). We find unpersuasive the State's argument that: (i) Aquino is presumed competent; (ii) the record offered no "reasonable basis" to doubt his competency; and therefore, (iii) there was no need to proceed to a competency hearing. In this case, once the trial

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[6] Our review of whether a trial court erred in failing to hold an appropriate competency hearing is *de novo*. Auerbach v. State, 273 So. 3d 134, 136 (Fla. 3d DCA 2019).

court acceded to the request to appoint doctors to evaluate Aquino, the trial court was required to follow through with a competency hearing and to make an independent competency determination. Fla. R. Crim. P. 3.212; Dougherty, 149 So. 3d at 676 ("[I]t is necessary for courts to observe the specific hearing requirements set forth in the rules in order to safeguard a defendant's due process right to a fair trial and to provide the reviewing court with an adequate record on appeal.").

Because the trial court – despite setting in motion the competency evaluations of Aquino – neither conducted a competency hearing nor made an independent competency determination, we conclude the trial court erred in entering the March 29, 2018 probation revocation orders.

B. The Remedy on Remand

1. Introduction

Our holding, above, raises the more difficult question of what remand instruction to give to the trial court. Aquino argues we should reverse the subject probation orders and require the trial court to conduct a new competency hearing, to be followed by a new probation revocation hearing if Aquino is deemed competent. Conversely, the State argues we should remand with instructions to the trial court to conduct a *nunc pro tunc* competency hearing, where the trial court would make a retrospective competency determination based on the evidence available at the time

of the probation revocation hearing. As more fully explained below, we leave this decision to the trial court to make upon remand.

2. Florida's General Remand Rule Per Mason/Dougherty

"Generally, the remedy for a trial court's failure to conduct a proper competency hearing is for the defendant to receive a new trial, if deemed competent to proceed on remand." Dougherty, 149 So. 3d at 678-79. The Dougherty Court, though, citing its prior decision in Mason v. State, 489 So. 2d 734, 737 (Fla. 1986), went on to recognize that, in some cases, a trial court may conduct a *nunc pro tunc* hearing to determine competency. Id. at 679.

Indeed, in Mason, the Court concluded "that no per se rule exists in Florida forbidding a *nunc pro tunc* competency determination regardless of the surrounding circumstances." Mason, 489 So. 2d at 737. The Mason Court remanded to the trial court the determination of competence noting that the trial court, on remand, "may find that there are a 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." Id. (quoting Martin v. Estelle, 583 F. 2d 1373, 1375 (5th Cir. 1979)). Recognizing the inherent problems with a post-hoc competency determination – such as reliance upon a cold record and lack of recent examinations of the defendant – the Mason Court expressly cautioned that "[s]hould the trial court find, for whatever reason, that an evaluation of Mason's competency

at the time of the original trial cannot be conducted in such a manner as to assure Mason due process of law, the court must so rule and grant a new trial." Id.

In sum, the remand rule we synthesize from Mason and Dougherty is that, depending on the circumstances of the case, a trial court may make a retroactive competency determination so long as the defendant is assured due process. It appears, though, that under Mason and Dougherty, the decision as to whether the case's circumstances and due process considerations warrant a new trial or a *nunc pro tunc* competency determination is left to the trial court to make upon remand. See Bynum v. State, 247 So. 3d 601, 604 (Fla. 5th DCA 2018) (remanding to the trial court to conduct a *nunc pro tunc* competency hearing so long as a retroactive determination assures defendant's due process);[7] see also Saunders v. State, 242 So. 3d 1149, 1151 (Fla. 4th DCA 2018); Baker v. State, 221 So. 3d 637, 641-42 (Fla. 4th DCA 2016); Silver v. State, 193 So. 3d 991, 994 (Fla. 4th DCA 2016); Cotton v. State, 177 So. 3d 666, 669 (Fla. 1st DCA 2015).

3. The Losada/Auerbach Exception

In two recent cases, however, this Court impliedly carved an exception to the Mason/Dougherty rule that the trial court, on remand, should determine the efficacy of a *nunc pro tunc* competency determination. In Losada v. State, 260 So. 3d 1156,

[7] We agree with the Fifth District in Bynum that a trial court should enter a written order with findings to memorialize its independent competency determination.

1163 (Fla. 3d DCA 2018) and Auerbach v. State, 273 So. 3d 134, 139 (Fla. 3d DCA 2019), this Court held, as a matter of law, that, due to the factual circumstances present in these two cases, *nunc pro tunc* competency hearings would not ensure the defendants' constitutional due process rights. This Court determined in these two cases that the significant gap in time that had occurred between the competency determinations and commencement of the defendants' trials precluded the trial court from making, on remand, a *nunc pro tunc* competency determination.

In Losada, the trial court, as in the instant case, made a competency ruling that was based on a counsel stipulation and not on the trial court's independent determination of the doctor evaluations. 260 So. 3d at 1163. The trial court's competency determination – that Losada had been restored to competence – occurred *twenty-eight months* before Losada's trial. Id. While the Losada Court recognized that, in some circumstances, a retroactive competency determination after remand is possible "based on evidence available at the time of trial," it held that, given the distended time period involved in that case, a retrospective competency hearing would not afford Losada due process. Id.

Similarly, in Auerbach, we found the relevant facts of Losada indistinguishable, and therefore concluded that, given the *thirty-two-month* gap between the competency hearing – where Auerbach was found to have been restored to competence – and Auerbach's trial, remand for a *nunc pro tunc* competency

determination would be "neither appropriate nor possible." 273 So. 3d at 140. Hence, as in Losada, this Court precluded the trial court from making a *nunc pro tunc* determination and remanded for a new trial following a determination of Auerbach's competence. Id.

4. The Instant Case

The exception to the Mason/Dougherty rule that this Court articulated in Losada and Auerbach is not applicable to this case. In Losada and Auerbach, we determined, as a matter of law, that – given the significant gaps between defendants' competency determinations and their trials (Losada, twenty-eight months; Auerbach, thirty-two months) – it simply was not possible on remand for the trial court to make a *nunc pro tunc* competency determination while also ensuring the defendants' due process. In this case, Aquino was examined in early May of 2017, and the trial court resolved the question of his competency (albeit improperly) on May 10, 2017. His probation revocation hearing occurred some eleven months later, on March 29, 2018.

It should also be noted that, in both Losada and Auerbach, the defendants had initially been declared incompetent, but had allegedly had their competency restored. See Auerbach, 273 So. 3d at 136; Losada, 260 So. 3d at 1160. In the instant case, at no time prior to the March 2018 revocation hearing had Aquino been

declared incompetent. Indeed, the only pre-revocation hearing evidence in the record are the doctors' May 2017 reports concluding Aquino was competent.

We are not faced with the same factual situation that confronted us in Losada and Auerbach. We cannot say, as a matter of law, that expert and lay witnesses – who observed Aquino contemporaneous with his revocation hearing – are not prepared to offer pertinent evidence at a retrospective competency hearing. Mason, 489 So. 2d at 737. We cannot say, conclusively, as a matter of constitutional law, that the trial court would be unable, on remand, to conduct a *nunc pro tunc* competency hearing that affords Aquino due process. Similarly, we cannot (and therefore do not) conclude that the trial court would be able to conduct a *nunc pro tunc* competency hearing that affords Aquino due process.

We therefore follow the general rule established in Mason/Dougherty, and we remand the case to allow the trial court to determine whether, consistent with the mandates of due process, a *nunc pro tunc* hearing to make a retroactive competency determination is possible.

III. Conclusion

The trial court erred by not conducting a competency hearing and by not making an independent competency determination. Thus, we remand for further

proceedings with substantially the same remand instructions that our sister court gave in Saunders,[8] to wit:

On remand, if the trial court can make a *nunc pro tunc* finding as to Aquino's competency based upon the existence of evaluations performed contemporaneous with its probation revocation hearing and without relying solely on a cold record, and can do so in a manner that abides by due process guarantees, then it should do so and enter a corresponding written order. If, however, the trial court finds, for any reason, that Aquino's competence at the time of the probation revocation hearing cannot be determined in a way that ensures Aquino' due process rights, then the trial court should proceed to adjudicate Aquino's current competency and, if he is competent, conduct a new probation revocation hearing.

Finally, as mentioned in footnote 2, *supra*, the State has conceded that the trial court erred by entering written probation revocation orders that did not conform to its oral pronouncements related to Aquino's unpaid costs of supervision and victim restitution. Irrespective of whether, on remand, the trial court makes a *nunc pro tunc* competency determination, any written order revoking Aquino's probation should identify the specific grounds for revocation and conform to the trial court's oral pronouncements at the hearing.

Remanded with instructions.

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[8] See Saunders, 242 So. 3d at 1151 (quoting Baker, 221 So. 3d at 641-42).