NO. COA12-126
NORTH CAROLINA COURT OF APPEALS

Filed: 21 August 2012

STATE OF NORTH CAROLINA

v. Gaston County
No. 11 CRS 54610

WARREN PERRY BARKER

Appeal by defendant from judgment entered 17 August 2011 by Judge Mark E. Powell in Gaston County Superior Court. Heard in the Court of Appeals 6 August 2012.

Attorney General Roy Cooper, by Assistant Attorney General John W. Congleton, for the State.

Robert W. Ewing, for defendant-appellant.

MARTIN, Chief Judge.

Defendant, Warren Perry Barker, was charged with one count of driving while impaired ("DWI"). Defendant was convicted in district court and appealed to superior court. Before the start of trial on 17 August 2011, the superior court noted that a motion for a forensic evaluation had been filed during the district court trial and a psychological evaluation of defendant was on record concluding that defendant was competent. Due to

uncertainty over whether a competency hearing had been conducted, the superior court held its own competency hearing during which defendant stated that he: (1) was in court because he had appealed the case and he was not drinking on the day in question; (2) he understood that he was in a courtroom; and (3) he was ready for the State's evidence. The court found:

> It appears from speaking with [defendant] he understands what's going on, he understands the procedure concerning defense counsel and concerning the prosecution, concerning law enforcement. I find he's competent to proceed.

At trial, Officer Josh McSwain of the Cherryville Police Department testified that on 28 March 2011 at 9:11 p.m. he was on patrol when he pulled defendant over for running a red light. Officer McSwain stated that he arrested defendant for suspicion of DWI, expired registration, expired inspection, and running a red light. Officer Kasey L. Cornwell testified that he administered an Intoximeter EC/IR II test to defendant which measured his blood alcohol level as .12.

Defendant testified on his own behalf stating that a "rookie" officer, Officer Dolittle, was present when he was pulled over on 28 March 2011. Defendant stated that Officer McSwain was training Officer Dolittle that evening. According to defendant's testimony, the traffic light was yellow when he

passed through the intersection and he had not consumed any alcohol "other than a little bit of wine" with lunch. Defendant also admitted to pleading guilty to a separate driving while impaired charge on 16 August 2011, the day before trial. During cross-examination, the following exchange took place:

> Q. (By [prosecutor]) Sir, weren't you convicted of driving while impaired yesterday?
>
> A. Yesterday.
>
> MS. ANDERSON: Objection.
>
> THE COURT: Overruled.
>
> THE WITNESS: Yesterday. You're -- what date are you -- yesterday.
>
> Q. (By [prosecutor]) August 16th.
>
> A. Yes, okay.
>
> Q. Was that a yes, you were convicted of DWI yesterday?
>
> A. Yeah, yeah, the first time, yeah.
>
> Q. Is it possible regarding the Sergeant Dolittle matter, that you're getting your DWIs mixed up?
>
> MS. ANDERSON: Objection.
>
> THE COURT: Overruled.
>
> Q. (By [prosecutor]) Let me ask you –
>
> A. Dr. Dolittle (sic) arrested me the first time, okay, outside of the Watering Hole, a

> whole different ball game, okay? This is a whole different ball game. What's your name, sir?

Defendant was convicted of driving while impaired and gave oral notice of appeal.

Defendant contends that his due process rights were violated when the court failed to initiate a second competency hearing *sua sponte* after defendant exhibited confusion while testifying in court. We are not persuaded.

North Carolina law provides:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

N.C. Gen. Stat. § 15A-1001 (2011). Determination of a defendant's competency is within the trial court's discretion, and that determination, if supported by evidence, is conclusive on appeal. *State v. Willard*, 292 N.C. 567, 575-76, 234 S.E.2d 587, 592-93 (1977); *State v. Nobles*, 99 N.C. App. 473, 475, 393 S.E.2d 328, 329 (1990), *aff'd and remanded on other grounds by* 329 N.C. 239, 404 S.E.2d 668 (1991). The trial court has a duty to conduct a competency hearing *sua sponte* where there is substantial evidence before the court suggesting that the

defendant may not be mentally competent to stand trial. *State v. Whitted*, ____ N.C. App. ____, ____, 705 S.E.2d 787, 791 (2011) (citing *State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221, *cert. denied*, 552 U.S. 997, 169 L. Ed. 2d 351 (2007)). A defendant does not have to be at the highest level of mental functioning to be considered competent but must have the capacity to confer with his counsel and rationally assist in his own defense. *State v. Shytle*, 323 N.C. 684, 689, 374 S.E.2d 573, 575 (1989). Even where there is some evidence that could suggest incompetence, if that evidence is outweighed by substantial evidence indicating a defendant is competent to stand trial, the court is not required to conduct a competency hearing. *See Badgett,* 361 N.C. at 260, 644 S.E.2d at 221.

We conclude that the court's determination that defendant was competent to stand trial is supported by the record. Defendant's competency was first examined pursuant to a motion in district court and a hearing was again held regarding competency prior to the start of trial in superior court. Although defendant's trial testimony shows a slight confusion regarding the details of his two driving while impaired charges, defendant's behavior and testimony at trial never reached the level necessary to call into question the evidence in favor of

the court's determination that defendant was competent to stand trial. The psychological evaluation declaring defendant competent, defendant's responses to the trial court, and defendant's ability to make the decision to testify in his own defense all support the court's conclusion that defendant was competent to stand trial.

Furthermore, great deference is given to defense counsel's representation that his client is competent since counsel is usually in the best position to determine if the client is able to understand the proceedings and assist in their own defense. *State v. Staten*, 172 N.C. App. 673, 678, 616 S.E.2d 650, 654 (citing *State v. McRae*, 163 N.C. App. 359, 369, 594 S.E.2d 71, 78, *disc. review denied*, 358 N.C. 548, 599 S.E.2d 911 (2004)), *appeal dismissed and disc. review denied*, 360 N.C. 180, 626 S.E.2d 838 (2005), *cert. denied*, 547 U.S. 1081, 164 L. Ed. 2d 537 (2006). Here, defense counsel proceeded with trial and did not raise the issue of competency following the pre-trial hearing. While defense counsel made and renewed a motion to dismiss the case, counsel never moved to have defendant reevaluated or voiced any additional concerns regarding defendant's competency.

Therefore, we hold the evidence before the trial court did not raise substantial concerns regarding defendant's competency and thus did not require the court to hold a second competency hearing *sua sponte*. Accordingly, we find no error.

No error.

Judges STEPHENS and ERVIN concur.

Report per Rule 30(e).