AFFIRMED and Opinion Filed May 18, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00575-CR
No. 05-19-00576-CR

JEREMY CARDELL MINOR, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 203rd Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F-14-76288-P, F-14-71793-P

MEMORANDUM OPINION

Before Justices Schenck, Osborne, and Reichek
Opinion by Justice Osborne

Appellant was convicted by a jury of two offenses of aggravated robbery[1] and sentenced by the trial court to twenty-five years' imprisonment on both offenses. On

[1] Appellant was originally charged with four separate aggravated robberies. He was acquitted on two of those charges.

appeal,[2] appellant claims that the trial court failed to hold a formal competency hearing. The State responds that the trial court acted within its discretion by not conducting a formal competency trial because the informal inquiry did not result in any evidence of incompetency. We agree with the State.

Trial Proceedings, Evaluation and Competency Finding

At the conclusion of the punishment phase of the trial, but prior to sentencing, the following occurred:

> THE COURT: Sir, have you ever been a patient of MetroCare services? Have you ever been diagnosed with a mental illness?
>
> THE DEFENDANT: I was going to MetroCare when I got out.
>
> THE COURT: For what reason?
>
> THE DEFENDANT: Paranoid schizophrenia.
>
> THE COURT: Okay. Both sides rest and close?
>
> [BY DEFENSE COUNSEL]: MR. JOHNSON: Yes, ma'am. You can come back here.
>
> [BY THE PROSECUTOR]: Yes, Your Honor.
>
> THE COURT: Before I sentence this gentleman, I want him evaluated by a psychiatrist. I've heard all the evidence in sentencing but I just – I want to know that he's competent by a psychiatrist. I think there is possibility he's competent but honestly I don't know. So before I sentence him, I want a competency evaluation.

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[2] Appellant did not file timely notices of appeal. However, on post-conviction writs of habeas corpus, the Court of Criminal Appeals determined that appellant was entitled to file out-of-time appeals in these cases. *Ex parte Minor*, WR-87,943-03, 2018 WL 5932247, at *1 (Tex. Crim. App. Nov. 14, 2018) (per curiam) (not designated for publication).

> Tell Yolanda to see if Dr. Pittman can get that done ASAP. I would appreciate.

A recess was taken in order for Dr. Michael Pittman to evaluate appellant and report back to the court.

Dr. Pittman, in his written report, stated that he did not believe appellant had a current mental illness. Dr. Pittman noted that appellant had not been treated for a mental illness at MetroCare prior to his arrest or while he was in prison or jail. Dr. Pittman's report also found that appellant (1) had sufficient present ability to understand the proceedings against him, (2) was capable of cooperating with his attorney in formulating a defense with a reasonable degree of rational understanding, (3) understood the charges against him, (4) was able to discuss his actions and thoughts in the time period surrounding the alleged offense, (5) seemed able to make reasonable choices in matters concerning his legal situation, (6) understood the adversarial nature of the courtroom, (7) could control his behavior in the courtroom, (8) could testify on his own behalf, and (9) knew the potential consequences of the proceedings. Dr. Pittman concluded that appellant was competent to stand trial.

When the punishment phase of the trial resumed, the following occurred:

> THE COURT: So the jury having found you guilty on these on December 2, 2016, and then we stopped and I had Dr. Pittman evaluate you for competency, Dr. Pittman found you competent; so, therefore, the Court will find you competent at this time.
>
> And before I sentence you, sir, I'm going to give both sides five minutes for argument.

[BY DEFENSE COUNSEL]: . . . I certainly understand the Court is interested in making sure that you're a hundred percent satisfied on the competency issue – but I've been representing the defendant for a couple of years, I want the record to reflect this, that I would have never gone to court and gone to trial with a defendant that I didn't believe was a hundred percent competent. And I want the Court to know, and I want the record to reflect, even though – because of his continued denial about his guilt in the case and in light of all the evidence that was presented, I just want the record to reflect, I certainly would have never tried this case if I had questions about his competency.

THE COURT: Okay. And I understand that, but the Court just also wanted to be –

[BY DEFENSE COUNSEL]: Absolutely.

THE COURT: – correct before I sentence someone on serious cases. So with that said, I will entertain closing arguments.

Standard of Review

We review a trial court's decision regarding an informal competency inquiry for an abuse of discretion. *Montoya v. State,* 291 S.W.3d 420, 426 (Tex. Crim. App. 2009), *superseded on other grounds by statute as recognized in Turner v. State*, 422 S.W.3d 676, 692, n.31 (Tex. Crim. App. 2013). In conducting our review, we do not substitute our judgment for that of the trial court, but rather determine whether the trial court's decision was arbitrary or unreasonable. *Id*. A trial court's firsthand factual assessment of a defendant's competency is entitled to great deference on appeal. *Ross v. State*, 133 S.W.3d 618, 627 (Tex. Crim. App. 2004).

Competency

The prosecution and conviction of a defendant while he is legally incompetent violates due process. *Turner*, 422 S.W.3d at 688-89; *see also Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (stating "[w]e have repeatedly and consistently recognized that 'the criminal trial of an incompetent defendant violates due process.'"). No plea of guilty or plea of nolo contendere should be accepted by a trial court unless it appears that the defendant is mentally competent and his plea is free and voluntary. TEX. CODE CRIM. PROC. ANN. art. 26.13(b). A defendant must also be mentally competent to be sentenced. *Casey v. State*, 924 S.W.2d 946, 949 (Tex. Crim. App. 1996).

A defendant is presumed to be competent to stand trial and shall be found competent unless proved incompetent by a preponderance of the evidence. CRIM. PROC. art. 46B.003(b). A defendant is incompetent if he does not have (1) sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or (2) a rational as well as factual understanding of the proceedings against him. *Id*. art. 46B.003(a). Either party may suggest by motion, or the trial court may suggest on its own motion, that a defendant is incompetent. *Id*. art. 46B.004(a).

Procedures for Determining Competency

Procedurally, a trial court must employ two steps for making competency determinations before it may conclude that a defendant is incompetent to stand trial. *Boyett v. State*, 545 S.W.3d 556, 563 (Tex. Crim. App. 2018). The first step is an informal inquiry made upon a suggestion from any credible source that the defendant may be incompetent. *Id*. (citing to CRIM. PROC. art. 46B.004(a), (c), (c-1)). The standard at the informal inquiry stage is whether there is "some evidence" of incompetency to stand trial. *Id*. (citing to CRIM. PROC. art. 46B.004(c)). The "some evidence" standard requires "more than none or a scintilla" of evidence that "rationally may lead to a conclusion of incompetency." *Id*. (citing to *Turner*, 422 S.W.3d at 692). Second, a trial court must consider only evidence that tends to show incompetency. *Id*. at 564. Third, some evidence must be presented at the informal inquiry stage to show that the defendant's mental illness is the source of his inability to participate in his own defense. *Id*.

If the requirements of an informal inquiry are met, then the trial court must proceed to the second step by ordering a psychiatric or psychological competency examination, and, except for certain exceptions, a formal competency trial. *Id*. at 563. (citing to CRIM. PROC. arts. 46B.005(a), (b), 46B.021(b)). A formal competency trial is not required if "(1) neither party's counsel requests a trial on the issue of incompetency; (2) neither party's counsel opposes a finding of incompetency; and

(3) the court does not, on its own motion, determine that a trial is necessary to determine incompetency." CRIM. PROC. art. 46B.005(c).

Additionally, a trial court always has the ability to appoint an expert to evaluate a defendant for competency:

> a) On a suggestion that the defendant may be incompetent to stand trial, the court may appoint one or more disinterested experts to:
>
> > (1) examine the defendant and report to the court on the competency or incompetency of the defendant; and
> >
> > (2) testify as to the issue of competency or incompetency of the defendant at any trial or hearing involving that issue.

CRIM. PROC. art. 46B.021.

No Evidence of Incompetency

Here, the trial court judge asked appellant if he had ever been diagnosed with a mental illness; appellant replied that he had been diagnosed with paranoid schizophrenia and had received treatment at MetroCare. The trial court then appointed a psychiatrist to evaluate appellant, as it was entitled to do by statute.

Appellant argues that the trial court determined that evidence existed to support a finding that appellant was incompetent because it ordered appellant to be examined by a psychiatrist. However, the mere fact that the trial court ordered a psychiatric examination to determine whether appellant was competent to stand trial does not constitute evidence of incompetency or mandate a formal proceeding.

The case of *Fields v. State*, No. 11-17-00066-CR, 2019 WL 386467 (Tex. App.—Eastland Jan. 31, 2019, no pet.) (mem. op., not designated for publication), is instructive. In that case, at the outset of a probation revocation hearing, Fields' trial counsel verbally raised the issue of his competency to stand trial based on information that trial counsel had received from Fields' sister. *Id*., 2019 WL 386467, at *1. Trial counsel informed the trial court that, although he and Fields had previously discussed Fields' diagnosis of multiple personality disorder, Fields' sister had recently described Fields as "becoming different people." *Id*. Trial counsel orally requested a competency evaluation. *Id*. The trial court granted the request, suspended the proceedings, and ordered a psychiatric examination to determine whether Fields was competent to proceed with the hearing. *Id*. The evaluating psychiatrist prepared and filed a report with the trial court in which he concluded that Fields was competent to stand trial. *Id*. The trial court subsequently signed a fee voucher for the psychiatrist's services to the court. *Id*.

When the revocation hearing resumed, the trial court acknowledged that there had been a psychiatric evaluation done and asked Fields' trial counsel about Fields competency to stand trial:

> THE COURT: And as I said, there's been a psychiatric evaluation, and so there's not any question of his current competency, is there, [defense counsel]?
>
> [DEFENSE COUNSEL]: No, Your Honor.

> THE COURT: All right. So, then in that light[,] your plea of not true is accepted and the State may call its first witness.

Id. at * 2.

On appeal, Fields claimed that, by ordering the evaluation and paying the psychiatrist, the trial court found "some evidence" of incompetency during its informal inquiry. *Id*. at * 3. Fields further claimed that, by failing to hold a formal competency trial at that point, the trial court abused its discretion. *Id*.

The Eastland Court of Appeals disagreed, holding that the trial court's action of ordering a psychiatric evaluation for competency did not constitute evidence of incompetency:

> Although the trial court ordered a psychiatric examination to determine whether Appellant was competent to stand trial, the mere fact that the trial court ordered such an evaluation, and thereafter signed a payment voucher for the expert's services, does not constitute evidence of incompetency. . . . Rather, the psychiatric examination was a procedure specifically requested, ordered, and performed to determine whether there was some evidence of incompetency during the informal inquiry; it was not evidence of incompetency itself.

Id. at *3. *See also Ayers v. State*, No. 01-14-00621-CR, 2016 WL 316490, at *4 (Tex. App.—Houston [1st Dist.] Jan. 26, 2016, no pet.) (mem. op., not designated for publication) (holding that the "mere fact that the trial court ordered an evaluation" does not constitute evidence that a defendant was incompetent to stand trial).

In this case, the comments made by the trial court to defense counsel clearly reflect that the appointment of Dr. Pittman was done in an abundance of caution after appellant self-reported that he was being treated for a mental illness. As in Fields, the psychiatric examination was requested by the trial court for the express purpose of determining if there was evidence of incompetency, not because the trial court had found evidence of incompetency.

The evaluation reflected that appellant was not being treated for a mental illness, either at MetroCare or elsewhere. As Dr. Pittman's report states:

> He (appellant) claimed that his girlfriend had wanted him to go to Metrocare after he told her that he had been seeing and talking to his deceased mother, but this did not eventuate before his arrest. His description of these claimed hallucinations was unusual, and he vaguely indicated that these had begun years before, though in previous jail screenings he denied hallucinating. He said that he had not been treated in prison or in the jail for any mental problems.

Dr. Pittman did not believe that appellant had a current mental illness. Nor, as noted above, did he find evidence that (1) appellant lacked the ability to consult with his attorney sufficient to prevent his ability to consult with his lawyer with a reasonable degree of rational understanding or (2) he lacked a rational as well as factual understanding of the proceedings against him. Dr. Pittman concluded that appellant was competent to stand trial. Additionally, appellant's trial counsel told the trial court that appellant was competent.

In this case, the trial court was not required to proceed further as there was no evidence of incompetency. We overrule appellant's issue.

Conclusion

The trial court's judgment is affirmed.

/Leslie Osborne/
LESLIE OSBORNE
JUSTICE

DO NOT PUBLISH
TEX. R. APP. P. 47.2(b)
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Court of Appeals
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JUDGMENT

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THE STATE OF TEXAS, Appellee	Reichek participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered May 18, 2020

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