Opinion issued June 14, 2012.

In The

Court of Appeals

For The

First District of Texas

NO. 01-11-00595-CR

ANGEL GARAY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Case No. 1276317

MEMORANDUM OPINION

Appellant, Angel Garay, was charged by indictment with burglary of a habitation. He pleaded guilty without a sentencing recommendation and the trial court sentenced him to four years in prison. On appeal, he contends that the trial

court abused its discretion by failing to conduct a sua sponte inquiry into Garay's competency after sentencing. We affirm.

Background

The record shows that Garay and two other men broke into a home and stole guns and ammunition. Garay entered a plea of guilty to burglary of a habitation on March 24, 2011.

At his July 5, 2011 sentencing hearing, Garay's father and sister testified. Both stated that since his arrest Garay had not associated with the same friends and had spent more time at home with his family. Neither offered any testimony about Garay's mental health. Garay also testified. According to Garay, he acted only as a lookout for the other two men involved in the burglary and he participated because he needed money to pay a lawyer. Garay testified that he had a job at the time of the hearing and if he received probation, he would work at a warehouse driving fork-lifts and heating metals. Garay stated that he intended to go back to school and get a license for automotive technology. According to Garay, he would be able to transfer his current enrollment at a college in New Orleans to a school in Houston.

At the end of the hearing, the trial court sentenced Garay to four years in prison. After the sentencing, the trial court ordered that Garay be put on suicide watch. The notes on the trial court's order show that while in custody, Garay told

the bailiff that he had thoughts of killing himself but had not had those thoughts on that particular day. He also told the bailiff that he "sometimes hears voices."

Standard of Review

A trial court's decision to not hold a sua sponte informal inquiry into an appellant's competency is reviewed for an abuse of discretion. *See Kostura v. State*, 292 S.W.3d 744, 746 (Tex. App.—Houston [14th Dist.] 2009, no pet). An abuse of discretion occurs where a trial court's decision lies outside the zone of reasonable disagreement. *Anderson v. State*, 193 S.W.3d 34, 37 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). "A trial court abuses its discretion if its decision is arbitrary or unreasonable." *Lawrence v. State*, 169 S.W.3d 319, 322 (Tex. App.—Fort Worth 2005, pet. ref'd).

Applicable Law

A defendant is presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence. TEX. CODE CRIM. ANN. art. 46B.003(b) (West 2006). A defendant is not competent to stand trial if he lacks (1) a sufficient present ability to consult with his attorney 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).

Under article 46B.004 of the Texas Code of Criminal Procedure, the issue of a defendant's competency can be raised by either party or by the trial court on its own motion. Specifically, article 46B.004 provides:

> (a) Either party may suggest by motion, or the trial court may suggest on its own motion, that the defendant may be incompetent to stand trial. A motion suggesting that the defendant may be incompetent to stand trial may be supported by affidavits setting out the facts on which the suggestion is made.
>
> (b) If evidence suggesting the defendant may be incompetent to stand trial comes to the attention of the court, the court on its own motion shall suggest that the defendant may be incompetent to stand trial.
>
> (c) On suggestion that the defendant may be incompetent to stand trial, the court shall determine by informal inquiry whether there is some evidence from any source that would support a finding that the defendant may be incompetent to stand trial.

TEX. CODE CRIM. APP. PROC. ANN. art. 46B.004 (West Supp. 2011).

A defendant has the right to be competent throughout his or her entire trial, which includes sentencing. *Casey v. State*, 924 S.W.2d 946, 949 (Tex. Crim. App. 1996). The Texas competency statutes "allow competency to be raised by either party or the judge, at any time before sentencing is pronounced." *Rodriquez v. State*, 329 S.W.3d 74, 78 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (quoting *Morris v. State*, 301 S.W.3d 281, 290 (Tex. Crim. App. 2009)). This is reflected in Texas Court of Criminal Procedure article 46B.005(d), which states: "If the issue of the defendant's incompetency to stand trial is raised after the trial on the merits begins, the court may determine the issue at any time before the sentence is

pronounced." TEX. CODE CRIM. PROC. ANN. art. 46B.005(d) (West 2008). However, as the Fourteenth Court of Appeals has previously noted: "[S]entencing marks the final act of the trial stage [and] closes the door on the trial." *Rodriguez*, 329 S.W.3d at 78 (quoting *Casey*, 924 S.W.3d at 949). It further noted that, "when determining if the trial court should have had a bona fide doubt as to competency, we do not typically consider evidence brought to the trial court's attention for the first time after sentencing." *Id.* Rather, we consider only the evidence actually known to the trial court up until the point of sentencing. *Id*. at 78 (citing *Brown v. State*, S.W.2d 772, 775–76 (Tex. App.—Dallas 1997, pet. ref'd)).

The "evidence" required to trigger the mandatory informal inquiry can be any fact brought to the court's attention that raises a bona fide doubt regarding the defendant's competency. *Fuller v. State*, 253 S.W. 3d 220, 228 (Tex. Crim. App. 2008). Evidence raising a bona fide doubt "need not be sufficient to support a finding of incompetence and is qualitatively different from such evidence." *Alcott v. State*, 51 S.W.3d 596, 599 n.10 (Tex. Crim. App. 2001). Evidence is usually sufficient to create a bona fide doubt if it shows "recent severe mental illness, at least moderate retardation, or bizarre acts by the defendant." *See Montoya v. State*, 291 S.W.3d 420, 425 (Tex. Crim. App. 2009).

Analysis

It is undisputed that under articles 46B.004 and 46B.005(d), a trial court is required to hold an informal inquiry into an appellant's competency if evidence raising a bona fide doubt about an appellant's competency is presented to the trial court *before* sentencing. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.004, 46B.005(d). Garay admits that no evidence that could have triggered a duty to conduct an inquiry into his competency was brought to the trial court's attention before sentencing. However, Garay contends that even if the trial court was not *required* under articles 46B.004 and 46B.005 to inquire into his competency, the trial court nevertheless had discretion to conduct an informal inquiry on his competency before it adjourned for the day. In support of this contention Garay cites *Aguilera v. State*, 165 S.W.3d 695 (Tex. Crim. App. 2005). In *Aguilera*, the Texas Court of Criminal Appeals held that a trial court has the authority to modify a defendant's sentence if the modification is made on the same day as the assessment of the initial sentence and before the court adjourns for that day. *Aguilera*, 165 S.W.3d at 658. According to Garay, "if the courts are free to change their sentence before adjourning for the day as in *Aguilera*, then clearly they are also free to inquire into a defendant's competency." Garay contends that because evidence raising a bona fide doubt as to his competency came to the trial court's

attention only moments after sentencing, the trial court abused its discretion by not conducting an informal inquiry as permitted under *Aguilera*.

The competency statute requires a trial court to hold an inquiry before sentencing only if evidence raising a bona fide doubt as to competency is raised before then. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.004 ("If evidence suggesting the defendant may be incompetent to stand trial comes to the attention of the court, the court on its own motion *shall* suggest that the defendant may be incompetent to stand trial.") (emphasis added); *Id.* art. 46B.005 (if issue of competency "is raised after the trial on the merits begins, the court may determine the issue at any time before the sentenced is pronounced"). But as the Fourteenth Court of Appeals noted in *Rodriguez*, "sentencing marks the final act of the trial stage [and] closes the door on the trial" such that we will not consider evidence brought to the trial court's attention after sentencing in determining whether the trial court erred in failing to conduct an inquiry. *Rodriguez*, 329 S.W.3d at 78 (court would not consider evidence brought to the trial court's attention for first time in motion for new trial in evaluating argument that trial court abused its discretion in failing to conduct sua sponte competency inquiry). There is no requirement that the trial court conduct a competency inquiry after sentencing. *See* TEX. CODE CRIM. PROC. ANN arts. 46B.004, 46B.005. Accordingly, assuming without deciding that the trial court, under *Aguilera*, *could* have held an informal

inquiry into Garay's competency after sentencing, we conclude the trial court did not abuse its discretion by failing to do so.

Conclusion

We affirm the judgment of the trial court.

Rebeca Huddle
Justice

Panel consists of Justices Higley, Sharp, and Huddle.

Do not publish. TEX. R. APP. P. 47.2(b).