In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-14-00055-CR
No. 07-14-00057-CR
No. 07-14-00058-CR
No. 07-14-00060-CR

STEPHEN SCOTT MAYFIELD, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 415th District Court
Parker County, Texas
Trial Court Nos. CR 11-0866, 11-0867, 12-0159, 12-0160
Honorable Graham Quisenberry, III, Presiding

February 26, 2016

ABATEMENT AND REMAND

Before QUINN, C.J., and CAMPBELL and HANCOCK, JJ.

Appellant, Stephen Scott Mayfield, appeals his felony convictions for aggravated sexual assault of a child,[1] indecency with a child by contact[2] and sexual performance by

[1] TEX. PENAL CODE ANN. § 22.021 (West 2013).

[2] TEX. PENAL CODE ANN. § 22.11 (West 2013).

a child less than 14 years of age[3] and the resulting sentences that included confinement for life. We will abate the appeal and remand the case to the trial court.

Background

The five indicted offenses were tried together, over the course of four days, in December 2013. Appellant was sentenced five days later, on December 23.

A jury was seated and sworn on a Friday and presentation of evidence began on the following Monday. By the end of the day on Monday, the State had presented five of the six witnesses it called in the guilt phase, including the then-15-year-old victim, and appellant's personal physician. During her testimony, the victim identified photographs taken with appellant's cellphone during their sexual encounters. The photographs were admitted and published to the jury. At that point, court was recessed overnight, with the judge remarking in the jury's presence that cross-examination of the victim "will be the first order of business tomorrow."

Appellant, age 58, did not appear in court Tuesday morning. At the outset of in-court proceedings, and with the jury excused, counsel discussed with the court the circumstance that appellant had not appeared that morning because he was hospitalized, having ingested a sufficient number of pills to render himself unconscious. Appellant's counsel urged the court to consider appellant's competency to stand trial. He asked the court to take judicial notice for that purpose of appellant's medical records admitted into evidence the previous day during his physician's testimony. The court granted the request. After the parties stipulated to their admission, the court also

[3] TEX. PENAL CODE ANN. § 43.25(e) (West 2013).

admitted medical records of appellant's hospitalization the night before. The court further accepted the parties' stipulation that appellant at that time was "unresponsive to pain stimuli." Appellant's counsel offered his own testimony that his client had no present ability to consult with counsel, or to possess a rational understanding of the proceedings. Counsel further contended that statements appellant made the previous day,[4] coupled with his actions during the night, constituted "bizarre acts" raising evidence of incompetence. Counsel also moved for a mistrial.

The State cited the court to article 33.03 of the Code of Criminal Procedure[5] and asserted appellant's condition was the result of a suicide attempt, a willful and intentional act, and thus appellant had voluntarily absented himself from trial. The court stated it would hear the testimony of the witnesses the parties were prepared to offer, considering the evidence both on the question of appellant's competency and that of the applicability of article 33.03. The parties also stipulated that they could not know at that time "if or when" appellant "would be available."

The court heard testimony from appellant's mother, who stayed the previous night in the hotel room with her son. She testified of finding appellant sitting on the side of his bed during the night holding a glass of water and a "bottle cap." She also told of

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[4] Counsel did not elaborate on the statements he said appellant made.

[5] Article 33.03 of the Texas Code of Criminal Procedure provides:

> In all prosecutions for felonies, the defendant must be personally present at the trial, . . . provided, however, that in all cases, when the defendant voluntarily absents himself after pleading to the indictment or information, or after the jury has been selected when trial is before a jury, the trial may proceed to its conclusion.

TEX. CODE CRIM. PROC. ANN. art. 33.03 (West 2013).

becoming alarmed later because appellant was "breathing heavy" and was not responsive. She also testified she found a pill bottle on the floor and that 911 was called.

The police officer who responded to the call testified the dispatch was for "a suicidal person who had consumed some pills and was unresponsive." On his arrival at the hotel room, he attempted to revive appellant, but obtained only momentary reactions, "no alertness." He confirmed appellant's mother gave an officer a white bottle. A photograph depicts the words "do not revive" written on appellant's bare chest. The officer said appellant's mother told him of the writing when he arrived at the room. He said it appeared to have been written with a ballpoint pen. The officer thought appellant's mother's conduct was odd in some respects, but he testified, "I don't know if you can say it was anything other than a suicide attempt."

The medical records confirm appellant arrived at the hospital by ambulance in an unresponsive state and was admitted to the intensive care unit in critical condition. The records also contain a reference to a family member's statement appellant had attempted suicide two years earlier.

Medical records sponsored by appellant's physician during his testimony on Monday showed appellant had been prescribed medication for depression for several years, beginning as early as 2004. The records indicate also appellant was on medication for pain management relating to several physical ailments. They also made reference to appellant's anxiety, his suicidal ideation and his formulation of a suicide plan.

After hearing the evidence and arguments of counsel, the court denied appellant's motion for mistrial, denied his motion for a continuance, and denied his motion for a competency examination under Chapter 46B of the Code of Criminal Procedure. Trial continued in appellant's absence and he was found guilty as charged in the indictment. At the punishment stage of trial, counsel reiterated he had been unable to meet with appellant, and that appellant could not be present or have a rational understanding of the proceedings against him. He re-urged his previous motions, including those for a continuance and for a competency examination. The court denied counsel's motions and proceeded with the punishment hearing.

Appellant was present in court at the December 23 sentencing hearing. Counsel for appellant told the court, "Your Honor, the defendant is present. I've had an opportunity to confer with him. He is conscious and awake. He has some understanding of the matters I've discussed with him, but I will tell the Court, for the record, he has a limited understanding. He's still confined to a wheelchair and unable to stand up. He is aware of where he is, but he has only a vague recollection of the last week of proceedings. So we intend to go forward, but I did want to make sure the record reflected that, Your Honor . . . . [O]ther than the matters concerning his incompetency and the previous motions that we've all read on the record, I'm not aware of any other matters."

Punishment was assessed and this appeal followed.

Analysis

In appellant's first issue, he argues the court erred by denying his motion for a competency examination before proceeding with the trial. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.005 (West 2014). In support of his argument, he contends the trial court was made aware of facts showing he was incompetent to stand trial and points to evidence of his long history of treatment for depression, his suicide attempt and his comatose condition.

The State argues we must resolve this issue against appellant because he voluntarily absented himself from the trial. In making its argument, the State relies on case law finding defendants who attempted suicide during trial were absent because of their own voluntary conduct. *See, e.g., Maines v. State,* 170 S.W.3d 149, 149-150 (Tex. App.—Eastland 2005, no pet.).[6]

In 2014, the Court of Criminal Appeals decided the case of *Brown v. State*, No. PD-1723-12, 2014 Tex. Crim. App. LEXIS 389 (Tex. Crim. App. March 19, 2014), in which a majority of the court found, on facts very like those before us, that the trial court erred by completing a trial in the defendant's absence after his suicide attempt. After the issuance of the court's opinion, and while the State's motion for rehearing was pending, Brown died. The court thereupon granted the State's motion to abate the appeal permanently, dismissed the motion for rehearing and the State's petition for

[6] The State also cites *Bottom v. State*, 860 S.W.2d 266 (Tex. App.—Fort Worth 1993, no pet.). Conscious that this case was transferred to us from the Second Court of Appeals, we have carefully considered *Bottom*. We conclude that case does not suggest a different disposition than we have ordered. When the defendant there ingested pills after his trial began, the trial court ordered a competency hearing, from which he was found competent to stand trial. *Id*. at 267. That is what appellant asked of the trial court in this case.

discretionary review, and withdrew its March 19, 2014 opinion. The court also directed the court of appeals to withdraw its prior opinion and abate the appeal permanently. *Brown v. State,* 439 S.W.3d 929 (Tex. Crim. App. 2014).

The State here argues we should not rely on the court's March 2014 decision in *Brown* because the opinions were withdrawn. While the State is correct the court's withdrawn March 2014 decision is not binding on us in the usual sense,[7] we do not think the court's analysis of the issues should be so readily ignored. The case produced three opinions in addition to Judge Johnson's majority opinion, reflecting a thorough consideration of the issues by the members of the court. 2014 Tex. Crim. App. LEXIS 389 (Cochran, J., concurring; Price, J., dissenting; Keasler, J., dissenting). We do not consider the members' opinions to have any precedential value but we do find their reasoning instructive and helpful.[8]

In *Brown*, the defendant suffered a gunshot wound to the head during an overnight recess of the guilt phase of his murder trial. The wound appeared to be self-inflicted, and left a bullet lodged in his brain. As in our case, on the following morning the court heard some evidence regarding the defendant's injury and his condition. A psychiatrist told the court he had been treating Brown for depression, the extent of his injuries made it unlikely Brown could provide information to assist in the remainder of the trial, and that if he had in fact tried to commit suicide, it would "suggest" mental

[7] *See, e.g., State v. Dominguez*, 425 S.W.3d 411, 424 (Tex.App.—Houston [1st Dist.] 2011, pet. ref'd) (intermediate court of appeals bound to follow precedent of Court of Criminal Appeals).

[8] *Cf*. *Carrillo v. State*, 98 S.W.3d 789, 794 (Tex. App.—Amarillo 2003, no pet.) (discussing use of opinions having no precedential value).

illness. *Brown,* 2014 Tex. Crim. App. 389 at *5-6. On those facts, and relying on *Drope v. Missouri,* 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975), Judge Johnson's majority opinion states that in such circumstances a trial court must first decide whether a defendant is competent, and only thereafter may proceed to the question whether his absence is voluntary. *Brown,* 2014 Tex. Crim. App. 389 at *23 ("Only after a determination of competence is made should a court consider the question of the voluntariness of a competent defendant's absence").

In her concurring opinion in *Brown*, Judge Cochran noted that "the trial judge apparently took the position that, because [Brown] voluntarily shot himself in the head, he was *ipso facto* voluntarily absent from trial, and therefore, it would not matter if he were incompetent either before or after he shot himself." *Brown,* 2014 Tex. Crim. App. 389 at *33. The record before us demonstrates the trial court here also believed the law required it to adopt that position.

But, like in *Brown*, the court here heard evidence appellant was under treatment for depression.[9] Appellant was prescribed medication for that condition. The evidence also suggests appellant wrote "do not revive" across his chest before consuming enough pills to render himself comatose. The medical records that were before the court contain evidence of a previous suicide attempt. And, as noted, the parties stipulated appellant at that time was "unresponsive to pain stimuli," and stipulated they could not know at that time "if or when" he "would be available."

[9] Unlike Brown, appellant's treatment for depression pre-dates, by several years, the offenses for which he was convicted. *See Brown*, 2014 Tex. Crim. App. LEXIS 389 at *5 (psychiatrist testified he had been treating Brown for depression arising from the murder).

The trial court conducted an informal inquiry by receiving evidence regarding appellant's competence when he was absent on the Tuesday morning of trial. TEX. CODE CRIM. PROC. ANN. art. 46B.004; *see Grizzard v. State*, No. 01-06-00930-CR, 2008 Tex. App. LEXIS 4999, *14-15 (Tex. App.—Houston [1st Dist.] July 3, 2008, no pet.) (finding trial court's actions constituted informal inquiry). The question in an informal inquiry is "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. PROC. ANN. art. 46B.004(c). To make the determination, "a trial court must consider only that evidence tending to show incompetency, 'putting aside all competing indications of competency, to find whether there is some evidence, a quantity more than none or a scintilla, that rationally may lead to a conclusion of incompetency.'" *Turner v. State*, 422 S.W.3d 676, 692 (Tex. Crim. App. 2013) (internal citation omitted). If, after an informal inquiry, and with exceptions not applicable here, the court determines there is evidence to support a finding of incompetency, the court "shall stay all other proceedings in the case." TEX. CODE CRIM. PROC. ANN. art. 46B.004(d). And, the court "shall order an examination under Subchapter B [of Chapter 46B] to determine whether the defendant is incompetent to stand trial in a criminal case." TEX. CODE CRIM. PROC. ANN. art. 46B.005(a).

We think there can be no doubt the trial court heard some evidence that rationally might lead to a conclusion appellant was incompetent to stand trial. It was the court's obligation at that point to stay all other proceedings and order an examination under Subchapter B.

Having determined the trial court erred by finding Brown had voluntarily absented himself from trial, permitting its continuation under article 33.03, without first determining whether he was competent, Judge Johnson's majority opinion concluded the appropriate remedy was a retrospective competence hearing. *Brown,* 2014 Tex. Crim. App. 389 at *24-26. We reach the same conclusion here, and accordingly will abate the appeal and remand the case to the trial court for a retrospective competency determination. *See Huff v. State*, 807 S.W.2d 325 (Tex. Crim. App. 1991) (per curiam) (finding retrospective determination proper relief).

The appeal is abated, and the case remanded to the trial court. On remand, the court shall initiate proceedings to determine whether appellant was competent to stand trial, at both the guilt and punishment phases of his trial and at his sentencing, by assessing whether he met the standard set out in article 46B.003. *See* TEX. CODE CRIM. PROC. ANN. arts. 46B.005(d), 46B.021. The court shall empanel a jury on request of either party or on its own motion. TEX. CODE CRIM. PROC. ANN. art. 46B.051(a). Otherwise, the court shall proceed under article 46B.051(b). The court shall cause a record of the proceeding to be prepared and filed with this court. If the trial court is unable to complete the retrospective determination and cause the record to be filed here by June 1, 2016, the court shall file a status report by that date.

It is so ordered.

Per Curiam

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