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. CR11-0866, CR11-0867, CR12-0159, CR12-0160
Honorable Graham Quisenberry, III, Presiding

February 9, 2017

OPINION

Before QUINN, CJ., and CAMPBELL and PIRTLE, JJ.

A Parker County jury convicted appellant, Stephen Scott Mayfield, of three felony offenses of aggravated sexual assault of a child,[1] one offense of indecency with a child

[1] TEX. PENAL CODE ANN. § 22.021 (West 2013). The indictments alleged appellant caused contact between his sexual organ and the victim's; contact between his mouth and her sexual organ; and contact between his sexual organ and her mouth.

by contact[2] and one offense of sexual performance by a child less than 14 years of age,[3] and assessed sentences of confinement for life for each of the aggravated sexual assault convictions, twenty years' confinement for each of the other two convictions and a $10,000 fine in each of the five convictions. On appeal, appellant raises two issues. We will affirm.

Background

Appellant does not challenge the sufficiency of the evidence supporting his convictions for sexual offenses committed by appellant, then age 56, against his niece, then 13. We will recite only those facts necessary to an understanding of his appellate issues.

Issue One – Competency Examination

By the first issue set out in appellant's brief, he contended the trial court erred by failing to conduct a competency examination before proceeding further with the December 2013 jury trial when evidence was presented that appellant had attempted suicide by ingesting an overdose of prescription medication and was hospitalized in a comatose condition. The evidence was presented when appellant did not appear for the second day of testimony.[4] The State took the position then that appellant had

[2] TEX. PENAL CODE ANN. § 22.11 (West 2013). The indictment alleged appellant engaged in sexual contact by touching the victim's genitals.

[3] TEX. PENAL CODE ANN. § 43.25(e) (West 2013). The indictment alleged appellant produced a performance, a photograph that included sexual conduct by the victim.

[4] Appellant remained absent through the remainder of the guilt/innocence and punishment phases of trial. He was present five days later for sentencing.

voluntarily absented himself and the jury trial should proceed to its conclusion, pursuant to article 33.03 of the Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN. art. 33.03 (West 2015).

After reviewing the record, we agreed with appellant's contention the court had erred by denying his motion for a competency examination. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.021 (West 2016). We abated the appeal and remanded the cause to the trial court for a retrospective competency determination. *Mayfield v. State,* Nos. 07-14-00055-CR, 07-14-00057-CR, 07-14-00058-CR, 07-14-00060-CR, 2016 Tex. App. LEXIS 2060 (Tex. App.—Amarillo Feb. 26, 2016, no pet.) (mem. op., not designated for publication).

The trial court conducted the retrospective trial on competency, and has filed supplemental clerk's and reporter's records. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.051. Those records show the court appointed Kelly R. Goodness, Ph.D. to examine appellant for the purpose of determining whether he was competent to stand trial in December of 2013. The record shows also no jury was requested, and Dr. Goodness's report was admitted into evidence without objection. Appellant's counsel told the court the defense had hired an independent psychologist who also had reviewed the report. Appellant presented no evidence at the competency trial.

Dr. Goodness's report reflects his thorough evaluation of appellant, including his review of medical and legal records and his clinical interview and observation of appellant. The report states that after being informed of the purpose of the evaluation, appellant "readily agreed to participate." The report goes on to detail appellant's

descriptions to Dr. Goodness of his background, medical issues and family relationships, the events that preceded his 2013 trial and the events during the trial prior to his suicide attempt. From the report, it is apparent appellant discussed his suicide attempt with Dr. Goodness in some detail. Many of the factual recitations in the report appear as direct quotes from appellant's descriptions during his interview with Dr. Goodness. The report addresses appellant's relationship with his counsel.

The report expresses Dr. Goodness's opinion that appellant was competent to stand trial. It expresses his finding that appellant does not have an intellectual disability, and his opinion that appellant was not suffering from a mental illness or defect at the time of trial. With respect to appellant's attempt at suicide through an overdose of medication, the report states, "Once it became clear that there was no hope that his charges would be resolved in his favor, [appellant] made a considered, rational decision to end his life while he was out of custody and had the means to do so as he desired to avoid lifelong incarceration and related hardships." Outside of the incapacities caused by his voluntary overdose, Dr. Goodness found appellant did not lack capacity to understand the proceedings, charges and potential consequences, disclose pertinent facts to his attorney, engage in reasoned choices, exhibit appropriate courtroom behavior or testify. *See* TEX. CODE CRIM. PROC. ANN. arts. 46B.003, 46B.024; *Lampkin v. State,* 470 S.W.3d 876, 907-08 (Tex. App.—Texarkana 2015, pet. ref'd) (noting factors to consider in determining competency to stand trial).

The trial court signed a judgment of competency, finding appellant was competent to stand trial in December 2013. The parties have not supplemented their briefing after the filing of the supplemental clerk's and reporter's records of the

competency trial. We have before us no contention the trial court erred in its determination appellant was competent to stand trial.

The trial court's competency judgment also contains the court's finding appellant's absence from trial did not result from lack of competence to stand trial but was instead appellant's voluntary and intentional act.[5] "When a defendant voluntarily absents himself after pleading to the indictment, or after the jury has been selected, the trial may proceed to its conclusion." *Bottom v. State,* 860 S.W.2d 266, 267 (Tex. App.—Fort Worth 1993, no pet.); *accord, Gizzard v. State,* No. 01-06-00930-CR, 2008 Tex. App. LEXIS 4999, at *11-12 (Tex. App.—Houston [1st Dist.] July 3, 2008, no pet.) (mem. op., not designated for publication) (voluntary absence from ingestion of medication in suicide attempt); *Corder v. State,* No. 07-00-04253-CR, 2001 Tex. App. LEXIS 6184, at *7-8 (Tex. App.—Amarillo Sept. 5, 2001, no pet.) (mem. op., not designated for publication) (citing TEX. CODE CRIM. PROC. ANN. arts. 33.03, 37.06).

Our abatement and remand for a retrospective competency determination, coupled with the trial court's unchallenged rulings that appellant was competent and voluntarily absented himself from trial, dispose of appellant's first issue on appeal. The issue is overruled.

[5] See *Brown v. State,* No. PD-1723-12, 2014 Tex. Crim. App. LEXIS 389 at *23 (Tex. Crim. App. March 19, 2014) (Johnson, J.) (opinion withdrawn, 439 S.W.3d 929 (Tex. Crim. App. 2014) ("Only after a determination of competence is made should a court consider the question of the voluntariness of a competent defendant's absence"). As we discussed in our previous opinion abating this appeal, we refer to the withdrawn opinions of members of the Court of Criminal Appeals in *Brown* for the assistance they provide rather than for any precedential value. *Mayfield,* 2016 Tex. App. LEXIS 2060 at *8.

Issue Two—Ineffective Assistance of Counsel

Appellant's second issue focuses on his trial counsel's actions after appellant's suicide attempt. He contends that after the trial court denied counsel's motions for a continuance and for a competency examination, counsel "simply refused to participate any further in the trial of the case[,]" and thus failed to subject the prosecution's case to meaningful adversarial testing.

The argument on appeal does not address the prejudice component of the *Strickland* standard for evaluation of ineffective assistance claims. *See Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Strickland* defined that component as requiring the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694; *Hernandez v. State,* 726 S.W.2d 53 (Tex. Crim. App. 1986). Instead, appellant asserts this case is subject to the rule announced in *United States v. Cronic,* 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." 466 U.S. at 659. In *Bell v. Cone,* 535 U.S. 685, 122 S. Ct. 1843, 152 L. Ed. 914 (2002), the Court later emphasized that to justify a presumption of prejudice based on counsel's failure to test the prosecution's case, "the attorney's failure must be complete." 535 U.S. at 697. *See also Florida v. Nixon*, 543 U.S. 175, 190, 125 S. Ct. 551,160 L. Ed. 2d 565 (2004) (explaining *Cronic*'s

"narrow exception to *Strickland's* holding" that defendant asserting ineffective assistance of counsel must demonstrate both deficient performance and prejudice).

Appellant points to *Cannon v. State,* 252 S.W.3d 342 (Tex. Crim. App. 2008), in which the court found the defense counsel's performance met the *Cronic* standard, and argues the same is true here. In *Cannon*, before voir dire began, counsel moved for a continuance and for recusal of the trial judge. *Id.* at 350. The trial court denied the motions. Counsel then told the court he was not ready for trial, could not effectively represent the defendant and could not participate in the trial. *Id.* While counsel did move for an instructed verdict and pointed out a mistake in sentencing, counsel did not engage in jury selection, did not enter a plea for his client, did not argue to the jury, did not cross-examine the State's witnesses, did not make any objections, did not offer a defense, did not request special jury instructions and did not offer evidence or argue to the jury during the punishment phase of trial. *Id.* The court concluded that by counsel's behavior as a whole, the defendant was constructively denied his right to effective assistance of counsel. *Id.* The court noted that throughout trial defense counsel stated he was "unprepared to go forward." Taking counsel at his word, the court declined to speculate on other motives for his actions. It noted also that the record contained no suggestion that the defendant played any role in his attorney's conduct. *Id*.

The court in *Cannon* distinguished the facts before it from those in *United States v. Sanchez*, 790 F.2d 245 (2d Cir. 1986), a case there cited by the State. 252 S.W.3d at 350. Sanchez, the court pointed out, had absented himself and was tried *in absentia*, and had otherwise failed to cooperate with his lawyer. *Id*. at 350-51.

There are some similarities between counsel's actions at trial in the case before us and those in *Cannon*, but the differences are significant. First, in *Cannon,* counsel declined to participate at the very beginning of trial. Here, counsel was actively and effectively engaged in the trial through extensive voir dire, jury selection, opening statement, cross-examination of witnesses and objections to evidence through the first day of testimony. It cannot be said in this case that counsel's failure to test the State's case was "complete." *Bell*, 535 U.S. at 697. Second, unlike in *Cannon*, much of the State's evidence had been received before counsel engaged in the conduct appellant criticizes. And the evidence that had been received was damaging in the extreme to appellant's plea of not guilty. During the victim's direct examination, photographs taken with appellant's cellphone during their sexual encounters were received into evidence. The photographs, showing appellant and the victim nude, were such that the State was able, in argument, to point to a particular photograph depicting each of the acts alleged in the five indicted charges.

Third, counsel effectively addressed appellant's suicide attempt when appellant was absent the second day of testimony. Counsel presented evidence describing appellant's condition, and forcefully urged the court to proceed to a competency examination. When the trial court overruled counsel's efforts and proceeded with the trial, counsel did not cross-examine the victim or the State's remaining witness, present defense witnesses, present argument at the close of evidence on guilt/innocence, cross-examine the State's one punishment witness, present punishment evidence or present argument on punishment. Before the jury, counsel repeatedly stated he could not engage in those activities without his client present. The record makes clear that

counsel's choices were intentional and strategic. He continued to raise the request for a competency examination. Counsel's actions of which appellant now complains were not taken, like those in *Cannon*, merely for the reason that the attorney was "unprepared to go forward." They were taken in response to appellant's unexpected absence from trial after a suicide attempt, and the trial court's rulings that followed.

Fourth, appellant's conscious choice to attempt suicide played a role in the circumstances that faced his attorney in the midst of trial. In its discussion of *Sanchez*, the court in *Cannon* emphasized the impact of Sanchez's absence from trial and his otherwise obstructive conduct on his attorney's ability to pursue an active defense. 252 S.W.3d at 351. It is clear to us that counsel's attempt was to preserve his contention the court had erred by failing to order a competency examination, a position this court ultimately adopted. Appellant criticizes that strategy on appeal, but we cannot agree that it constitutes a showing counsel "boycotted the trial proceedings," or "abandoned his role as advocate for the defense," as the court found in *Cannon*. 252 S.W.3d at 350.

Appellant's counsel told the jury in opening statement that they would hear about the victim's on-going mental issues, including evidence she engaged in self-mutilation,[6] and the victim's sexual knowledge and "unnatural" sexual interest and awareness that predated her experiences with appellant. If counsel's choices regarding his conduct of the defense after appellant's suicide attempt precluded the jury from hearing that evidence, his choices might be addressed in a two-component *Strickland* analysis. But, for the reasons discussed, we cannot agree that the record supports a conclusion

[6] Counsel told the jury the victim was "a cutter," behavior unrelated to the incidents with appellant.

counsel thereby entirely failed to subject the prosecution's case to meaningful adversarial testing.

Appellant's second issue is overruled.

Conclusion

Having resolved each of appellant's issues against him, we affirm the judgment of the trial court.

James T. Campbell
Justice

Publish.