



**IN THE
TENTH COURT OF APPEALS**

No. 10-16-00220-CR

NASSIR ABUSHANAB,

Appellant

v.

THE STATE OF TEXAS,

Appellee

**From the 87th District Court
Leon County, Texas
Trial Court No. CM-15-409**

MEMORANDUM OPINION

Nassir Abushanab pleaded guilty to the offense of assault. The trial court deferred a finding of guilt, placed Abushanab on community supervision for 4 years, and assessed a \$1000 fine. The State filed a motion to adjudicate nine days later. The trial court found the allegations to be true and convicted Abushanab of the offense of assault. The trial court assessed punishment at 35 years confinement and a \$1000 fine and ordered the payment of appointed attorney's fees. We modify the judgment and affirm as modified.

In the first issue on appeal, Abushanab argues that the trial court erred in rendering judgment for appointed attorney's fees without any evidence of his ability to pay. The State concedes that the attorney's fees were assessed in error and agrees that the judgment should be reformed to remove the costs from Abushanab. We sustain the first issue on appeal. We modify the judgment to delete the requirement that Abushanab pay his court appointed attorney's fees.

In the second issue on appeal, Abushanab argues that the trial court erred in denying his request for a competency evaluation or conducting an informal inquiry into his competency before hearing the State's motion to adjudicate. This court has jurisdiction to resolve the issue of a defendant's competency at a hearing on the State's motion to adjudicate. *Durgan v. State*, 240 S.W.3d 875, 878 (Tex.Crim.App. 2007).

Upon suggestion that a defendant may be incompetent to stand trial, a trial court should determine by informal inquiry whether there is some evidence that would support an incompetency finding. TEX. CODE CRIM. PROC. ANN. art. 46B.004(c) (West Supp.2016). We review a trial court's failure to conduct a competency inquiry under an abuse of discretion standard. *Moore v. State*, 999 S.W.2d 385, 393 (Tex.Crim.App.1999); *Fluellen v. State*, 443 S.W.3d 365, 369 (Tex.App.-Texarkana 2014, no pet.). A trial court abuses its discretion if its decision is arbitrary or unreasonable. *Lewis v. State*, 911 S.W.2d 1, 7 (Tex.Crim.App.1995).

"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. PROC. ANN. art. 46B.003(b) (West 2006). "A person is incompetent to stand trial if the person does not have: (1) sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings against the person." TEX. CODE CRIM. PROC. ANN. art. 46B.003(a) (West 2006). The constitutional standard for competency to stand trial asks whether the defendant has a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him. *Turner v. State*, 422 S.W.3d 676, 689 (Tex.Crim.App. 2013).

On January 4, 2016, at the original guilty plea hearing, the trial court inquired about Abushanab's mental status. Abushanab stated that he understood the nature and consequences of the charges against him and that he was able to consult with his trial counsel about the facts of the case. Abushanab's trial counsel stated that he believed Abushanab was competent. On May 20, 2016, at the hearing on the State's motion to adjudicate, counsel made an oral motion for a competency hearing. The trial court inquired whether competency had been an issue previously. The State responded that there were no concerns about his competency. The trial court denied the request for a competency hearing.

After reviewing the record, we find that nothing suggested that Abushanab was incompetent at the time of the adjudication. See *Anthony v. State*, No., 06-15-00233-CR, 2016 Tex.App. LEXIS 6566 (Tex.App. - Texarkana, June 22, 2016, no pet.). The trial court could consider previous interactions with Abushanab. See *Fluellen v. State*, 443 S.W.3d at

370. Thus, we find that the trial court's duty to conduct an informal inquiry on a suggestion of incompetence was not triggered. See *Anthony v. State*, No., 06-15-00233-CR, 2016 Tex.App. LEXIS 6566 (Tex.App. – Texarkana, June 22, 2016, no pet.). We overrule Abushanab's second issue on appeal.

We modify the trial court's judgment to delete the requirement that Abushanab pay his court appointed attorney's fees. We affirm the judgment as modified.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
(Chief Justice Gray concurring with a note)*
Affirmed as modified
Opinion delivered and filed June 28, 2017
[CR25]

* Chief Justice Gray concurs in the Court's judgment to the extent that it affirms the trial court's judgment of guilt and the defendant's sentence. A separate opinion will not issue.

He notes, however, that he disagrees with the Court's determination that "the trial court's duty to conduct an informal inquiry on a suggestion of incompetence was not triggered" citing *Anthony v. State*. *Anthony v. State*, No. 06-15-00233-CR, 2016 Tex. App. LEXIS 6566 (App.—Texarkana June 22, 2016, no pet.) (publish). *Anthony and Fluellen v. State*, 443 S.W.3d 365 (Tex. App.—Texarkana 2014, no pet.), also cited by the Court, were both cases in which it was argued that there was sufficient indicia in the record to raise a "...suggestion ... that the defendant may be incompetent to stand trial." TEX. CODE CRIM. PROC. ANN. art. 46B.004(c) (West 2006). They are simply not applicable in this appeal.

In this appeal, an oral "Motion for a Competency Hearing" was made by counsel representing Abushanab. Such a motion, as a matter of law, constitutes a suggestion that the defendant is incompetent and triggers the trial court's duty to "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.” *Id.* (a), (c), (c-1). The trial court clearly recognized the duty to hold the informal inquiry and immediately proceeded to that step in the process asking, “[D]oes the State have anything to add on that? It’s never come up before, has it?” Although the issue had come up when the trial court conducted its due diligence before taking Abushanab’s plea by investigating his ability to make a knowing and voluntary plea, see *Gray v. State*, 257 S.W.3d 825, 827-828 (Tex. App.—Texarkana 2008, pet. ref’d), that hearing was conducted by a different trial court judge and, without something to get the record of that prior proceeding before the trial court judge as evidence in this hearing, see *Davis v. State*, 293 S.W.3d 794, 797-798 (Tex. App.—Waco 2009, no pet.), was not evidence for purposes of the informal inquiry then being conducted by the trial court. Abushanab offered no evidence in support of the motion for a competency hearing. As such, the only evidence before the trial court as to the defendant’s competence was what had transpired in open court prior to the informal inquiry conducted by the trial court. Based on a review of the record of the hearing up to the point in time when the motion was made, there is no evidence that would “support a finding of incompetency” as to require the trial court to order the competency evaluation or to proceed to a competency hearing. TEX. CODE CRIM. PROC. ANN. arts. 46B.004(d) and 46B.005(a), (b) (West 2006).

Because there was no evidence to support a finding of incompetency before the trial court, the trial court’s informal inquiry could reach only one conclusion; that there was no need to proceed towards a competency trial under Code of Criminal Procedure Chapter 46B. Therefore, the trial court’s denial of the motion to conduct a competency hearing was not error.

