Affirmed in Part, Reversed and Remanded in Part, and Majority and Dissenting Opinions filed January 13, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01134-CR
NO. 14-98-01135-CR

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JOSEPH REED, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause Nos. 770,135; 770,116

M A J O R I T Y O P I N I O N

This appeal concerns the degree of evidence of incompetency that necessitates a competency hearing by the trial judge. Appellant, Joseph Reed, entered the Gucci Department of Saks Fifth Avenue, selected an aqua green mink fur coat, placed it in a Lord and Taylor bag, and attempted to leave without paying; he was charged with felony theft and possession of a controlled substance. Each indictment included two enhancement paragraphs that appellant had been convicted twice before of felony theft. Appellant pled guilty to the charges and true to

the enhancements. The court assessed 20 years confinement for the theft offense and 35 years for possession of a controlled substance. Appellant presents four issues for review in this consolidated appeal: (1) the court erred in proceeding to the punishment phase when there was evidence in the record raising a bona fide doubt appellant was not competent to proceed to the sentencing phase of trial; (2) the court's failure to hold a competency hearing denied appellant due process; (3) the failure of either of appellant's two attorneys to request a competency hearing constituted ineffective assistance of counsel under the Sixth Amendment; and (4) ineffective assistance of counsel under Article 1, § 10 of the Texas Constitution. We affirm in part and reverse in part.

In his first and second issues, appellant shows that the following evidence was brought to the court's attention, requiring it to have held a competency hearing pursuant to TEX. CODE CRIM. PROC. ANN. Art. 46.02, §2(b):

1. Appellant's counsel and the State filed joint motions for psychiatric evaluation as to appellant's sanity and competency to stand trial, which the court granted. Both motions stated: "Defendant has a history of periods of unconsciousness and subsequent loss of memory and is undergoing continuous mental evaluation at LBJ hospital [sic] and is currently scheduled for a CAT SCAN."[1]
2. Appellant filed *pro se* motions for independent psychiatric evaluation and to offer insanity as a defense, neither of which the court ruled on. In the latter motion, appellant informed the court that he suffered seizures which totally incapacitate him and cause memory loss;
3. Appellant sent the court several letters, in which he informed the court of his mental illness, that he was taking drugs for it, and he felt his trial counsel was conspiring against him;
4. Appellant filed post-plea letters and motions with references to matters pertaining to a trial on the merits. These post-plea matters were no longer appropriate or timely because of the guilty pleas.
5. The pre-sentence investigation report indicated appellant suffered from seizures, memory loss and numbness of the face;

[1] The plea was entered May 15, 1998. The joint motion for psychiatric examination was filed June 20, 1998. The events listed occurred after the pleas were entered but before the sentencing hearing.

6. Appellant suffered a head injury in 1993 and was treated with tegretol and dilantin;

7. At the sentencing hearing, appellant stated to the court, ". . . the plea that I took . . . . I didn't know what it was and what it consisted of because I didn't know and I'm asking for your mercy in the court today." Appellant also stated he did not remember the incident giving rise to the theft charge.

Our own independent review of appellant's testimony shows both lucid responses and yet many stated memory lapses. After appellant's last statements, the court then imposed its sentences. The record reflects no psychiatric evaluation was performed and no competency hearing took place.

Discussion

Article 46.02 provides, in pertinent part:

> § 2. (b) If during the trial evidence of the defendant's incompetency is brought to the attention of the court from any source, the court must conduct a hearing out of the presence of the jury to determine whether or not there is evidence to support a finding of incompetence to stand trial.

Whether an issue of incompetency exists at trial is left to the discretion on the judge.[2] We therefore apply an abuse of discretion standard in deciding whether the court erred in not conducting a competency hearing prior to sentencing.[3] In determining whether evidence requires empaneling a separate jury to conduct a competency hearing, the trial court is to consider only the evidence tending to show incompetency, and not evidence showing competency, in order to find whether there is some evidence, a quantity more than none or a scintilla, that rationally could lead to a determination of incompetency.[4] The same standard

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[2] *Thompson v. State,* 915 S.W.2d 897, 901 (Tex. App.–Houston [14th Dist.] 1996, pet ref'd); *Ainsworth v. State,* 493 S.W.2d 517, 521 (Tex. Crim. App. 1973).

[3] Sentencing is part of the trial and competency considerations apply. *See Casey v. State,* 924 S.W.2d 946, 969 (Tex. Crim. App. 1996).

[4] *Sisco v. State,* 599 S.W.2d 607 (Tex.Crim.App.1980).

is applied whether the issue of competency is presented pre-trial or during trial.[5] The trial court may rely on personal observations, known facts, evidence presented, motions, affidavits, or any other reasonable claim or credible source creating a bona fide doubt of the defendant's competency to stand trial.[6]

We begin by noting that while there may have been indicators or alternative explanations in the record that could have led the trial court to believe appellant was competent, the proper standard of review of a section 2 hearing, as stated in *Casey v. State*,[7] is to view the trial court's decision "in the light most favorable to the party with the burden of securing the finding, *disregarding contrary evidence and inferences*."[8]

In *Casey*, the court of criminal appeals held that testimony the defendant in that case was presently suffering from amnesia was sufficient to require the trial court conduct a section 2 hearing. Here, the prosecutor and defense counsel jointly moved to have appellant examined for competency and sanity. The court agreed and ordered Harris County Forensic Psychiatric Services to conduct a psychiatric examination and file it with the court and that the State provide the examination to appellant. It also ordered that if Harris County could not file the report, it was to advise the court. The record does not reflect any of this occurred. Meanwhile, appellant several times advised the court of his mental illness, that he was suffering memory loss, that he had seizures, and was taking anti-seizure and anti-psychotic medication. At the sentencing hearing, appellant told the court he did not know what his guilty plea was, that he suffered from blackouts, and, several times, that he did not remember the incident for which he was being accused. Appellant testified he did not recall several past incidents. The court did not question appellant regarding the mental problems that had been

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[5] *Williams v. State*, 663 S.W.2d 832 (Tex.Crim.App.1984).

[6] *Thompson,* 915 S.W.2d at 902.

[7] 924 S.W.2d 946 (Tex. Crim. App. 1996) (per curiam).

[8] *Id.* at 948, n. 4 (emphasis in original).

brought to its attention, nor did it address the absence of psychiatric reports previously ordered. Significant evidence of appellant's potential incompetence was raised a number of times and continued to accumulate with no action taken by the trial court to inquire further or hold a preliminary hearing. There was more evidence raising the issue of appellant's lack of competence in this case than in *Casey*.

The State cites *Gardner v. State* 733 S.W.2d 195 (Tex. Crim. App. 1987) *cert. denied* 488 U.S. 1034, 109 S.Ct. 848 (1989) and *Valdes-Fuerte v. State* 892 S.W.2d 103 (Tex. App.–San Antonio 1994, no pet.) for the rule that a psychiatric examination ordered by a court does not alone establish an evidentiary issue on the defendant's competency to stand trial. While there is far more evidence in this record raising the issue of appellant's competence, we will address those cases. We note that in *Gardner*, the issues were different. There, appellant did not appeal because the judge failed to conduct a section 2 hearing, but because one of the psychiatrists who examined him later gave damaging testimony at trial regarding future dangerousness that appellant had attempted to suppress.

In *Valdes-Fuerte*, the court appointed a psychologist to examine the defendant for competency. The defendant actually underwent a competency evaluation by the psychologist. *Id.* at 107. After discussing with the defendant her family and medical history as well as her psychological maladies at the time of the examination, the psychologist confirmed the defendant understood the trial process as well as the functions of her lawyer, the prosecutor, the judge and the jury. *Id.* It was only then the psychologist concluded: the defendant had "sufficient present ability to consult with her lawyer with a reasonable degree of rational understanding of the proceedings against her" and that she was "competent to stand trial." *Id.*

In *Johnson v. State*, the defendant's counsel filed three motions requesting psychiatric examinations, all of which were granted and conducted. Though there was some evidence of delusions and paranoia, and that he had been hospitalized in the past twice for mental problems, two reports showed the defendant competent to stand trial. The third report was inconclusive. *Id.* at 708-09. The court of criminal appeals initially determined the trial judge should have

ordered a competency hearing, but on rehearing found the evidence insufficient to require a section 2 hearing. *Id.* at 700.

In *Collier v. State,* the appellant cited, among other things: (1) he sent a letter to the trial court stating, "I'm not in too good of mental order;" (2) he asserted to the trial court his standby counsel was conspiring against him; (3) defense counsel filed a motion to have a court-appointed psychologist assist in the defense because "there was evidence in the defendant's background which suggest[ed] that he may suffer from a mental or emotional condition . . . related to his alleged conduct in this case." In response to this evidence, the trial court held a section 2 hearing in which a psychiatrist testified that though the defendant was suffering from major depression, he was competent to stand trial. The defendant's two trial counsel also went on the record as stating their belief the defendant was competent. In dicta, the court of criminal appeals noted that the trial court need not have conducted the section 2 hearing because there was not sufficient evidence raising the issue of competency. *Id.* at 625.

If we stop our inquiry with the fact that the appellate courts in these cases concluded no competency hearing was required, we miss an important distinction from our case. In each of the cited cases, the trial courts took the precaution of having a psychiatric expert examine the defendant and then report their findings to the court; in each case *at least one expert affirmatively reported the defendant was competent.*

No such measures were taken in this case despite evidence of incompetency before the trial court.

We find there was sufficient evidence in the record to have raised a bona fide doubt as to appellant's competency at his sentencing hearing.

We do not reach the issue of ineffective assistance of counsel because its determination is unnecessary to the resolution of this case.

We remand for the trial court for further proceedings consistent with this opinion. Because the issue of appellant's competency[9] was not raised at the time he plead guilty, the case is remanded for sentencing only.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed January 13, 2000.
Panel consists of Justices Amidei, Edelman, and Wittig.
Publish — TEX. R. APP. P. 47.3(b).

[9] A defendant is presumed competent to stand trial, absent evidence raising a bona fide doubt of such competency. See TEX. CODE CRIM. PROC. ANN. art. 46.02 § 1A(b)(Vernon 1999).

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D I S S E N T I N G O P I N I O N

The issue in this case is whether the evidence was sufficient to create a *bona fide* doubt in the mind of the judge whether the defendant meets the test of legal competence. *See Moore v. State*, 999 S.W.2d 385, 393 (Tex. Crim. App. 1999). A person is incompetent to stand trial 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. *See* TEX. CODE CRIM. PROC. ANN. art. 46.02, § 1(a) (Vernon 1979).

In determining whether to conduct a competency inquiry, the trial court is to consider only the evidence tending to show incompetency, and not evidence showing competency, in order to find whether there is some evidence that could rationally lead to a determination of incompetency. *See Moore*, 999 S.W.2d at 393. The same standard is applied whether the issue of competency is presented pre-trial or during trial. *See id*. On appeal, the standard of review is abuse of discretion. *See id*.

To warrant a competency inquiry, it is not enough for counsel to merely allege unspecified difficulties in communicating with the defendant. *See id*. at 394. Rather, such information must be specific and illustrative of a present inability to communicate with the defendant. *See id*. Unruly and disruptive courtroom demeanor are also not probative of incompetence to stand trial; if they were, one could effectively avoid criminal justice through immature behavior. *See id*. at 395. Nor do prior hospitalization and treatment for depression *per se* warrant a competency hearing. *See id*. Rather, to raise the issue of competency by means of the defendant's past mental health history, there generally must be evidence of recent severe mental illness or bizarre acts by the defendant or of moderate retardation. *See id*. A trial court is thus within its power to find a defendant competent without a hearing despite evidence of depression or prior hospitalization when such evidence fails to indicate adequately either severe mental illness or recent impairment. *See id*. Similarly, a defendant's propensity toward depression does not necessarily correlate with his ability to communicate with counsel or his ability to understand the proceedings against him. *See id*. Nor does evidence of mental impairment alone require a hearing where no evidence indicates that a defendant is incapable of consulting with counsel or understanding the proceedings against him. *See id*. It is therefore within the purview of the trial judge to distinguish evidence showing only impairment from that indicating incompetency as contemplated by the law. *See id*. at 396.[1]

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[1] A trial judge's appointment of a disinterested expert is also dependent on a finding of evidence which raises the issue of appellant's incompetence. *See Collier v. State*, 959 S.W.2d 621, 625 (Tex. Crim. App. 1997), *cert. denied*, 119 S.Ct. 335 (1998).

In this case, appellant and the majority opinion rely on the following to raise a *bona fide* doubt regarding his competency: (1) appellant's motions for psychiatric evaluation which stated that he has a history of periods of unconsciousness and loss of memory and is undergoing continuous mental evaluation and was scheduled for a CATSCAN; (2) *pro se* motions in which appellant stated that he suffered seizures which totally incapacitate him and cause memory loss; (3) letters in which appellant informed the court of his mental illness, that he was taking drugs for it, and that he felt his counsel was conspiring against him; (4) appellant's post-plea letters and motions with reference to matters pertaining to a trial on the merits; (5) a PSI stating "The defendant reports to suffer from periodic epileptic seizures, memory loss, and the left side of his face is numb. No medical proof was provided at the time of this report to confirm the defendant's claim."; (6) the fact that appellant suffered a head injury in 1993 for which he was treated with tegretol and dilantin; and (7) the fact that at the sentencing hearing, appellant stated to the court that he didn't know what his plea was and that he didn't remember "stealing the coat."

The foregoing reflects drug use, some degree of mental impairment, and an obvious desire by appellant to be found incompetent. However, little, if any, of it is probative of appellant's actual ability to consult with a lawyer or understand the proceedings against him, let alone sufficient to create a *bona fide* doubt whether appellant meets the test of legal competence.[2] If anything, the *pro se* letters appellant wrote to the court reflect some understanding of the legal process, and those written on his behalf by another individual reflect an ability by appellant to consult with a lawyer. His conversations on the record with the trial court also reflect no lack of competence. In the absence of a *bona fide* doubt regarding appellant's competency, I would affirm the judgment of the trial court.

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[2] The majority opinion concludes that other appellate opinions in which the denial of a competency hearing was affirmed are distinguishable because they involved expert testimony that the defendant was competent. However, this overlooks the rule that only evidence of incompetency, and not competency, may be considered. *See Moore v. State*, 999 S.W.2d at 393.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed January 13, 2000.

Panel consists of Justices Amidei, Edelman, and Wittig.

Publish — TEX. R. APP. P. 47.3(b).