SUPREME COURT OF KENTUCKY
~~2013-SC-000149-DG~~
~~AND~~
2013-SC-000818-DG

COMMONWEALTH OF KENTUCKY — APPELLANT/CROSS-APPELLEE

ON REVIEW FROM COURT OF APPEALS
NO. 2010-CA-001971
V. MADISON CIRCUIT COURT NO. 01-CR-00110

CHRISTOPHER J. MCGORMAN JR — APPELLEE/CROSS-APPELLANT

REPLY BRIEF

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this "Reply Brief for Appellee/Cross-Appellant" has been mailed via first-class postage prepaid to Hon. Jean C. Logue, Madison County Courthouse, 101 W. Main St., Richmond, Kentucky 40475; Hon. David Smith, Madison County Commonwealth Attorney, P. O. Box 717, Richmond, Kentucky 40476-0717; Hon. Todd D. Ferguson, Assistant Attorney General, Criminal Appellate Division, 1024 Capital Center Drive, Frankfort, Kentucky 40601-8204, and by registered mail to Hon. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, 700 Capital Avenue, Frankfort, Kentucky 40601-3488 on this 5th day of January, 2015. The Record on Appeal has been delivered by carrier to the Kentucky Court of Appeals on this same date.

DENNIS J. BURKE

PURPOSE OF REPLY BRIEF

The purpose of this Reply Brief is to respond to factual and legal contentions of the Attorney General as set forth in the Brief for Commonwealth. The failure to address a particular issue should not be misinterpreted as a reflection that Mr. McGorman regards the issue to possess less merit than the issues addressed in the reply brief.

CITATIONS TO THE RECORD

The following symbols will be used to refer to the relevant volumes of trial record:

T.R. Trial record

T.R. – PC Post-conviction record

TABLE OF AUTHORITIES

ARGUMENT

C.J. McGorman was denied effective assistance when defense counsel failed to request a competency hearing after C.J. exhibited alarming behavior during trial.[1]

Early on in his trial, C.J. McGorman began displaying bizarre behavior. Paying no attention to the trial around him, C.J. remained in continual motion by rocking back and forth in his chair while staring down at his lap. See E.g. V.R. 8/6/01, 11:34:16-11:34:44; 12:42:43-12:43:10. C.J.'s trial counsel noticed that McGorman's behavior worsened as the day progressed. Post–conviction evidentiary hearing, TE 12/7/09, 11:40:23. At trial counsel's request, C.J. "was removed from the courtroom and watched his trial on a monitor in the back. He was given larger doses of medication so he could control himself during the proceedings." *Slip Opinion*, at 9.

C.J. did not participate in his trial and his trial counsel did not know whether he was capable of participating in his own defense. V.R. 12/7/09, 11:47:59. Counsel was "extraordinarily concerned" about C.J. during trial. *Id.* at 11:46:25. He was concerned that C.J.'s presence in the courtroom was "hurting him emotionally." Id., 11:48:29. He was not confident that C.J. was able to get through all this emotion of getting through trial as a fifteen or sixteen year old. *Id.* at 12:01:37.

Trial counsel was not present with C.J. during trial but he thinks C.J. watched the trial on the video feed from the courtroom. *Id.* at 12:04:11. Counsel talked with C.J. about the trial during breaks but "to be very candid, I was more interested in how he was doing because he wasn't being a great participatory interest with me." *Id.* 12:05:00. McGorman was able to "assist" counsel to the extent that he was able to tell counsel he

[1] C.J. unsuccessfully requested an evidentiary hearing on this claim. TR, P.C. 387, 410-412.

was watching the trial *Id.* at 12:04:20. "Was he helping me? No. He wasn't helping me." *Id.* at 12:04:47.

Although McGorman's condition deteriorated as the day [4/7/01] went on, and despite trial counsel's "extraordinary concern" about McGorman's mental health, *Id.* at 12:03:00, and his uncertainty as to whether McGorman was competent to stand trial, counsel decided not to request the court to stop the trial and have McGorman re-evaluated for competency to stand trial - as all trial tactic." *Id.* at 12:01:50.

A. Ineffective assistance standard.

C.J. McGorman is entitled to effective representation at trial. *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* is premised upon the Sixth Amendment. A trial court's conclusions regarding the effectiveness of trial counsel performance is a mixed question of law and fact which this Court should review *de novo*. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008).

Whether counsel provided effective representation is assessed under the two-pronged *Strickland* standard: 1) whether counsel's performance was deficient as measured by the relevant legal community and 2) whether the defendant was prejudiced by any deficiency. This Court must "conduct an objective review of [counsel's] performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Wiggins*, 539 U.S. at 523 (*quoting*, *Strickland*, 466 U.S. at 688) (emphasis added); *Poindexter v. Mitchell*, 454 F.3d 564, 577 (6th Cir. 2006). "The proper measure *of attorney performance remains simply reasonableness under prevailing* professional norms." *Strickland*, 466 U.S. at 688. American Bar Association

standards and the like are guides to determining reasonable attorney performance. *Strickland*, 466 U.S. at 688; *Padilla v. Kentucky*, 130 S.Ct. 1473, 1482 (2010) (citing *Strickland*); *Wiggins*, 539 U.S. at 524 (citing *Strickland*). Prejudice requires showing a reasonable probability that the result of the proceeding would have been different; this prejudice is, "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. As noted by the Supreme Court, this is less than a preponderance standard. *Id.* at 694 (unreliability or unfairness demonstrated "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."

B. Principles governing competency determinations.

The Supreme Court has repeatedly recognized that "the criminal trial of an incompetent defendant violates due process." *Medina v. California*, 505 U.S. 437, 453 (1992); *Drope v. Missouri*, 420 U.S. 162, 171-172 (1975); *Pate v. Robinson*, 383 U.S. 375, 378 (1966).

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.
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> *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996)(quoting *Riggins v. Nevada*, 504 U.S. 127, 139-140 (1992)(opinion concurring in judgment)).

The test for incompetence is also well settled. A defendant may not be placed on trial unless he "'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding ... [and] a rational as well as factual understanding of the

proceedings against him.' " *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam)[2]. The defendant bears the burden of proving incompetence to stand trial. *Mozee v. Commonwealth*, 769 S.W.2d 757, 758 (Ky. 1989).

C. The Commonwealth's misplaced reliance upon the trial court's finding no issue as to C.J.'s competency.

The Commonwealth declares that it cannot "add anything to the extensive decision making of the trial court[3] [that there was no issue as to competency] and so simply asks this Court to affirm the judgment of the trial court." Second Brief for the Commonwealth (Argument III-IV), p. 9.

The trial court found that C.J. McGorman's competency was not an issue, and defense counsel's decision not to request another competency evaluation and hearing was a reasonable trial strategy. *Court of Appeals Slip Opinion*, at 10. The trial court reached this conclusion because (1) a competency issue had been conducted pre-trial and C.J. was found competent to stand trial and (2) "there was no testimony presented by any of the doctors at trial indicating the defendant was not competent to stand trial." TR-PC, 412.

The Commonwealth's adoption of the trial court's reasoning is deeply flawed. As an initial matter, the competency hearing was held on February 27, 2001 – more than five months before C.J. began decompensating at his own trial. As was noted in C.J.'s initial brief, at p. 21, competency is fluid. "Even when a defendant is competent at the

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[2] See also KRS 504.060(4): "incompetency to stand trial" means that as a result of a mental condition, the defendant lacks the capacity to appreciate the nature and consequences of the proceedings against one or to participate rationally in one's own defense.

[3] The Hon. William T. Jennings presided over McGorman's trial. The Hon. Jean C. Logue presided over McGorman's post-conviction proceedings.

commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Drope v. Missouri*, 420 U.S. 162, 181 (1975). In *Drope*, the Court ruled that the correct course was to suspend the trial until such an evaluation could be made. *Id.* See also, *Bishop v. Commonwealth*, 118 S.W.3d 159, 162 (Ky. 2003) (Competency to stand trial defined as the defendant's mental state at the time of trial).

Second, as the trial court observed, three doctors (two medical doctors and a psychologist) testified for the defense at trial and none raised a concern about McGorman's ability to participate in the trial. TR-PC 412. However, the trial court's description of the testimony paints a distorted picture. While all three doctors testified regarding the possible side effects of the medication C.J. was prescribed, none testified regarding C.J.'s competence on the day of trial.

Dr. Robert Granacher, a forensic psychiatrist, was not asked by either attorney or the court whether McGorman was competent on the day of trial. See VR, 8/7/01, 12:58:00- 13:39:10. In any event, Dr. Granacher was in no position to offer his opinion as to C.J.'s competency on the day of trial as he had not examined or had contact with C.J. since May 23, 2001, two months earlier. Also, Dr. Granacher did not know what medication C.J. was taking at the time of trial. *Id.* at 13:39:17. The record is silent regarding whether Dr. Granacher, or any of doctors who testified at trial observed C.J.'s behavior during trial.

Dr. John Gallehr is a treating psychiatrist who testified regarding his diagnosis and treatment. V.R. 8/7/1, 13:50:55. He was C.J.'s treating psychiatrist, not someone who "gives testimony for other reasons." Id. at 13:52:40. Dr. Gallehr was not asked his

opinion on whether C.J. was competent to stand trial. Nor does the record indicate whether Dr. Gallehr was trained in or had or experience in determining a defendant's competency to stand trial, or whether he examined C.J. since he began decompensating.

Dennis Buchholz is a psychologist. He evaluated C.J. prior to trial, and believed C.J. had improved enough to be competent to stand trial as of February of 2001. However, Dr. Buchholz testified at trial that had "no opinion of his current mental status." V.R. 8/8/1, 9:17:00. Dr. Buchholz also was not familiar with C.J.'s current medication protocol. *Id.* at 9:10:48.

The court also denied C.J. due process when it improperly denied him an evidentiary hearing. In *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-53 (Ky. 2001), this court held that an evidentiary hearing is required on RCr 11.42 claims "if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record. . . ." The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." The Court of Appeals affirmed without an evidentiary hearing not because it competency **can** be conclusively proved or disproved by an examination of the record, but because it **cannot**.

The court's reasoning, affirmed by the Court of Appeals, cannot withstand scrutiny. The court ruled without a hearing that there is no merit to C.J's claim that trial counsel was ineffective in failing to request a competency evaluation and hearing because none of the three doctors who testified at trial for the defense raised any concern about the defendant's ability to participate in the trial process . *Slip Opinion*, pp. 10-11. Yet the reason there was no mention at trial of C.J.'s ability to participate in the trial process at

trial is not because there was no evidence of incompetency. Rather, trial counsel made a tactical decision not to question C.J.'s competency at trial, which the court, again without a hearing, found to be reasonable. *Id.* Clearly, an evidentiary hearing was required.

The lower court decision cannot withstand scrutiny for yet another reason: side effects of psychotropic drugs can render a defendant incompetent to stand trial. See *Riggins v. Nevada*, 504 U.S. 127, 142 (1992) (Kennedy, J. concurring). "The drugs can prejudice the accused in two principal ways: (1) by altering his demeanor in a manner that will prejudice his reactions and presentation in the courtroom, and (2) by rendering him unable or unwilling to assist counsel." As the trial court noted in its order, testimony at trial was that C.J.'s rocking back and forth was likely the result of the side effects of C. J.'s medication combined with severe anxiety. See the trial Court's order at TR-PC 412:

> Dr. Granacher testified that the rocking was in part due to the anti-psychotic medications the defendant was taking, and that it was common for people on such medications to shuffle or stomp their feet, rock back and forth, or move their body in some fashion, but it was also due in part to anxiety. (Trial Tape, Day 2, between 13:28-13:50). Dr. Gallehr testified that it was possible the four medications the defendant was taking caused the rocking, but he thought the rocking was more attributable to stressful situations and that rocking was a calming behavior for the defendant. (Trial Tape, Day 2, approx. 14:03).

Regardless of whether C.J.'s state of mind was the direct result of his mental illness, or a result of side effects from his medications, he was likely incapable of rationally assisting in his own defense.

Next, even after the trial court denied an evidentiary hearing on this particular claim, the trial court entered two additional orders addressing the merits after the post-

conviction evidentiary hearing on December 7, 2009[4]. See Second Brief for the Commonwealth, at p. 8. In that hearing, McGorman's trial counsel testified regarding his perception of his client's mental state at the time of trial. See Post–conviction evidentiary hearing, TE 12/7/09, 11:32:00 *et seq*. Nevertheless, in the orders subsequent to the hearing, the trial court utterly ignored trial counsel's testimony when reaching the merits of the claim (as did the Court of Appeals). Disregarding the testimony of defense counsel is error because "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense." *Medina v. California*, 505 U.S. 437, 450 (1992).

Finally, the trial attorney's trial tactic to waive C.J.'s defense of his competence to stand trial was not reasonable. See *Slip Opinion*, at 10-11. The relevant mental health standard or guide reads, "[d]efense counsel should move for evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence." ABA Criminal Justice Mental Health Standards, Standard 7-4.2(c) (1989).

Even as counsel acted upon his trial tactic he was "extraordinarily concerned" about C.J.'s mental status. VR 12/7/09 at 11:46:25. Counsel was concerned that C.J.'s presence in the courtroom was "hurting [C.J.] emotionally." *Id*., 11:48:29. He was not confident that C.J. was able to get through all this emotion of getting through trial as a fifteen or sixteen year old. *Id*. at 12:01:37. Counsel knew that his client suffered from mental illness and was receiving treatment including medication. VR 12/7/09 11:34:40. He noticed that C.J. during jury voir dire C.J., was "extremely uncomfortable," rocking

[4] See August 17, 2010 Order at TR-PC 542-546 and September 27, 2010 Order at TR-PC 675-76.

back and forth in his chair looking down at his lap. *Id* at 11:40:53. C.J.'s behavior worsened as the day progressed. VR 12/7/09, 11:40:23. Counsel did not know whether C.J. was capable of participating in his own defense. VR 12/7/09, 11:47:59 although he acknowledged that C.J. had not participated in his trial before or after counsel requested that he be removed from the court room. *Id.* at 11:36:09. Trial Counsel spoke with Dr. Buckholz, a psychologist, about C.J. and he too was "extraordinarily concerned" about his mental health during the trial, but trial counsel did not "frame" the conversation with Buckholz in terms of competency to stand trial. *Id.* at 12:02:46; 12:03:04. They talked about the pressure he was under acting as a potential trigger of the mental illness for which C.J. was being treated. *Id.* at 12:02:56.

An objective review of counsel's performance in light of his description of the events at trial makes clear that a reasonable attorney would have a sound basis to question C.J.'s competency and to demand further evaluation. See KRS 504.100(1). Furthermore, counsel's "trial tactic" cannot have been reasonable if defense counsel was in doubt as to his client's competency, because a defendant's whose competence is in doubt cannot be deemed to have knowingly and intelligently waived his right to a competency hearing. *Pate v. Robinson*, 383 U.S. at 384. Again, "an objective review of [counsel's] performance, measured for reasonableness under prevailing professional norms" reveals that trial counsel's trial tactic was not reasonable. See *Strickland v. Washington*, 466 U.S. at 688.

Beyond the requirement of proving deficient performance, C.J. must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, there is a reasonable probability he would have been found incompetent to stand trial. See

Strickland at 694. At the time of trial, C.J. was displaying bizarre behavior such that the jury was casting "looks" at him during trial, and severe enough that trial counsel was compelled to have him removed from the trial out of "extraordinary" concern for C.J.'s mental health. V.R. 12/709, 11:41:30-11:41:30. Regardlesss of the cause of C.J.'s mental condition, a reasonable probability exists that C.J. lacked the capacity to participate rationally in his own defense. Because C.J. McGorman received ineffective assistance of counsel, this Court should reverse the Court of Appeals, and remand for a new trial. Alternatively, this Court should reverse and remand for an evidentiary hearing that C.J. was previously denied.

Conclusion

C.J. McGorman respectfully requests this court to vacate the conviction and sentence and remand for a new trial.

Respectfully submitted,

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