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IN THE SUPREME COURT OF THE STATE OF NEVADA

ANGELO FERGUSEN, A/K/A ANGELO
FERGUSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48420

FILED

SEP 11 2008

TRACIE W. LINDEMAN
CLERK OF SUPREME COURT
BY *J. Castillo*
CHIEF DEPUTY CLERK

Appeal from a judgment of conviction, upon jury verdict, of one count each of burglary, sexual assault, robbery, and first-degree kidnapping. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Reversed and remanded.

Philip J. Kohn, Public Defender, and Howard Brooks, Deputy Public Defender, Clark County,
for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; David J. Roger, District Attorney, and Christopher J. Lalli and Nancy A. Becker, Deputy District Attorneys, Clark County,
for Respondent.

BEFORE THE COURT EN BANC.

OPINION

By the Court, DOUGLAS, J.:

In this criminal appeal, we consider whether the Eighth Judicial District Court improperly delegated the adjudication of all

competency matters to a particular district court judge. We further consider whether the district court is required to grant a defendant a hearing as to competency upon the defendant's return from a mental health facility.

We conclude that under the Eighth Judicial District Court Rules (EDCR), the Eighth Judicial District may assign the determination of all initial competency matters (NRS 178.415 and NRS 178.455) to a particular district court judge; however, the determination of a defendant's ongoing competency thereafter and during trial must vest with the trial judge who has been assigned to hear the matter. In addition, upon a defendant's return from a mental health facility where the defendant has been deemed competent to stand trial, the district court upon a timely request must afford the defendant a hearing wherein the defendant is afforded the opportunity to examine the members of the treatment team regarding their report. Moreover, a defendant's right to a hearing cannot be waived when the challenge is based on the defendant not having the sufficient present ability to consult with defense counsel with a reasonable degree of rational understanding or on the defendant not having a rational, as well as factual, understanding of the proceedings against him or her.

Accordingly, we conclude that the district court erred in not affording appellant Angelo Ferguson a hearing as to competency after he had returned from a mental health facility. While Ferguson's request for a hearing may have been untimely under the relevant statute, he should have been afforded a hearing as to competency because his request for a hearing was based in part on a claim that he did not have the sufficient

present ability to consult with defense counsel. We further conclude that defense counsel raised sufficient doubt as to Ferguson's competency.¹ As a result, we reverse the judgment of conviction and remand this matter for a new trial, so long as Ferguson is found to be competent to stand trial.

FACTS AND PROCEDURAL HISTORY

In 2003, Ferguson was charged with burglary, sexual assault, robbery, and first-degree kidnapping. After he was bound over to district court for trial, many continuances relating to Ferguson's competency were granted throughout 2004 and 2005.

In 2005, Ferguson's defense counsel filed a motion to declare Nevada's competency standard unconstitutional. At the hearing on the motion, defense counsel informed the district court that two psychologists had deemed Ferguson incompetent to stand trial. As a result, the district court took no action on the motion relating to Nevada's competency standard and ordered Ferguson to be sent to Lake's Crossing Center, a mental health facility operated by the Division of Mental Health and Developmental Services of the Department of Health and Human Services (Division), for a competency determination.

In 2005, the Eighth Judicial District Court assigned the determination of all competency matters to Eighth Judicial District Court Judge Jackie Glass (Department 5). Consistent with this policy, when

¹As defense counsel had contested Ferguson's ability to achieve competency after his treatment at the mental health facility, defense counsel presented medical opinions that Ferguson was permanently incompetent and did not have the ability to regain competency.

Ferguson returned from Lake's Crossing, Department 5 handled the proceedings related to his competency. During the court proceedings, a deputy public defender notified Department 5 that she was "covering" this matter for another deputy public defender who represented Ferguson and who had other appearances to make in the district court, and she therefore requested a continuance. The district court denied the request and conducted the competency hearing. At the hearing, the district court received the report by the Division's Administrator as to Ferguson's competency. According to the report, three doctors at Lake's Crossing had deemed Ferguson competent to stand trial. Based on this information, Department 5 determined Ferguson to be competent and ordered the case to proceed to trial. Ferguson's trial was assigned to Eighth Judicial District Court Judge Stewart L. Bell (Department 7).

Thereafter, during a status check hearing in Department 7, defense counsel informed the district court that before Ferguson went to Lake's Crossing, counsel was going to challenge whether Ferguson could ever be rendered competent to stand trial. Additionally, defense counsel informed the district court that counsel had not received the Lake's Crossing report, which Department 5 had relied upon in finding Ferguson competent to stand trial. As defense counsel argued that Ferguson was still not competent to stand trial, the district court informed counsel that they could file a motion, which would be considered by Department 5.

Nearly two months after the status check hearing, defense counsel filed a motion for a hearing as to competency. In this motion, defense counsel sought a hearing in order to challenge the report made by the Lake's Crossing treatment team. Further, in this motion, defense

counsel stated that they still had not received the report from Lake's Crossing.

Department 5 heard arguments on defense counsel's motion for a competency hearing. Defense counsel informed Department 5 that counsel had received the report from Lake's Crossing and that the report had been delivered to defense counsel's office beforehand but apparently had not been transferred to the deputy public defender assigned to Ferguson's case. At the hearing, the State objected to the motion as untimely. The State further argued that it had received information from the detention center showing that Ferguson was competent to stand trial, as Ferguson apparently had been requesting documents in preparation of his own defense and had been "hoarding" his medications in order to sell them. In addition, the State noted that defense counsel had not presented any new reports that showed Ferguson decompensating and merely based the challenge on evaluations that took place prior to Ferguson's commitment to Lake's Crossing. After considering the parties' arguments, Department 5 determined that because it had considered untimely motions in other cases, it would grant defense counsel's motion for a hearing as to competency prior to Ferguson's trial date, which had been set by Department 7. Further, Department 5 informed defense counsel that, if needed, it would provide a subpoena or court order allowing defense counsel to obtain Ferguson's "day-to-day treatment" reports from Lake's Crossing.

Subsequently, however, Department 5 notified the parties that it had reconsidered its decision and no longer intended to grant the motion for a competency hearing. At a chambers conference, the court apparently asked defense counsel to provide additional reasons to justify a

competency hearing. Defense counsel argued that a hearing as to competency was warranted because Ferguson did not have the present ability to aid and assist defense counsel, which according to defense counsel, made him incompetent to stand trial. Five days later, Department 5 held a hearing to make a record of what had taken place during the chambers conference. At this hearing, Department 5 found that based on its review of the Lake's Crossing report and reports from the detention center, Ferguson was competent to stand trial and that Ferguson did not meet the standard for incompetency under Dusky v. United States,² despite defense counsel's contention that Ferguson was not able to aid and assist defense counsel. Based on these findings, Department 5 concluded that a hearing as to competency, as requested by defense counsel, was not warranted. Defense counsel objected to Department 5's findings and filed an offer of proof and affidavit under seal with respect to what defense counsel would have shown if there had been a hearing as to competency.

Thereafter, Ferguson's case was transferred back to Department 7. Defense counsel filed another motion for a competency hearing. While defense counsel made the same arguments as they had in the previous motion considered by Department 5, they argued that counsel had to file that motion without the benefit of the Lake's Crossing report and that no formal findings of competency had been made by the district court. Department 7 held a hearing on the new motion. At the hearing, Department 7 noted that because Department 5 had found defense

²362 U.S. 402 (1960).

counsel's arguments to be without merit and found Ferguson to be competent to stand trial, Department 7 was unwilling to entertain the motion for a hearing as to competency.

Defense counsel subsequently filed a writ petition in this court, which we ultimately denied.³ Upon our denial of defense counsel's writ petition, the district court set Ferguson's trial to start in September 2006.

Shortly before the trial date, defense counsel orally informed the district court that they were having Ferguson talk to some psychologists who would possibly deem him incompetent to stand trial. In responding to defense counsel's assertions, the district court determined that it would nevertheless commence trial the following week, as it informed defense counsel that Department 5 would not consider evidence relating to competency from any doctors who were not appointed by Department 5. While defense counsel reiterated that Ferguson was not communicating with counsel, the district court ordered that trial would proceed.

On the first day of trial, defense counsel filed a motion to strike all the rulings made by Department 5 and to compel a de novo hearing as to Ferguson's competency. In this motion, defense counsel argued that the district court should have stricken Department 5's rulings because Department 5 had manifested bias and prejudice, as it had attempted to file an amicus curiae brief in the defense's writ petition.

³Ferguson v. Dist. Ct., Docket No. 47519 (Order Denying Petition, July 27, 2006). In denying the writ petition, we also directed the clerk to return unfiled the untimely amicus curiae brief filed by Department 5.

Additionally, defense counsel maintained that Ferguson was still not able to consult with defense counsel. While the district court allowed defense counsel to file their motion to strike, it did not consider the motion. Defense counsel thereafter requested a stay and filed another writ petition seeking this court's intervention, which was denied.⁴

At the conclusion of the jury trial, Ferguson was found guilty on all charges. At sentencing, defense counsel informed the district court that counsel was not prepared to go forward because they were not able to review the parole and probation report with Ferguson. Defense counsel asked the district court for additional time to allow Ferguson to undergo a psychiatric evaluation and further asserted that under Nevada's competency statutes, Ferguson should have been sent to Lake's Crossing. The district court disagreed and noted that Ferguson had engaged in conversations with the district court every day while waiting for defense counsel's arrival in the courtroom and based on its daily conversations with Ferguson, the district court determined that defense counsel's request to send Ferguson back to Lake's Crossing was not warranted. Consequently, the district court sentenced Ferguson, and this appeal followed.

DISCUSSION

Determination of all competency issues by Department 5

Ferguson argues that Nevada law does not authorize the Eighth Judicial District Court to delegate the adjudication of all

⁴Ferguson v. Dist. Ct., Docket No. 48029 (Order Denying Petition, September 13, 2006).

competency matters to Department 5. Specifically, Ferguson contends that EDCR 1.33, which directs the chief judge for the district to assign judges to specialized terms as needed, does not specifically provide for the assignment of all competency matters to a particular district court judge. Further, Ferguson argues that while a master or judge may handle certain procedural competency matters under EDCR 1.48(k)(11), the ultimate competency determination must be made by the trial judge who has been assigned to adjudicate the case.

The State responds that the Eighth Judicial District Court Rules permit the assignment of all competency determinations to a particular department. The State contends that because EDCR 1.30(b)(5) permits the chief judge of the Eighth Judicial District Court to make regular and special assignments for all judges within the district, the chief judge may assign all competency determinations to Department 5. The State further argues that the assignment of all competency determinations to Department 5 is lawful because EDCR 1.30(b)(15) allows the chief judge to reassign cases from one department to another department as convenience or necessity requires. Additionally, the State contends that NRS 3.025 and NRS 3.026 require the assignment and adjudication of competency matters in as uniform a manner as practicable.

“In Nevada, a chief judge is broadly authorized to carry out the district courts’ inherent authority to ensure the orderly administration

of judicial business.”⁵ We review the chief judge’s exercise of this authority for abuse of discretion.⁶

Pursuant to the Eighth Judicial District Court Rules, the chief judge has the general authority to “[m]ake regular and special assignments of all judges.”⁷ Further, the chief judge must assign judges “to specialized divisions of the court for 2-year terms as needed.”⁸ However, EDCR 1.33 does not specifically provide for a division specialized in competency matters. Regarding cases, the chief judge has “the authority to assign or reassign all cases pending in the district.”⁹ Further, “[u]nless objected to by one of the judges concerned, criminal cases, writs or motions may be consolidated or reassigned to any criminal department for trial, settlement or other resolution.”¹⁰

We conclude that under EDCR 1.30(b)(5), 1.60(a), and 3.10(b), the chief judge of the Eighth Judicial District has the discretion to assign the determination of all competency matters to Department 5. While EDCR 1.33 does not explicitly provide for a specialized competency court

⁵Halverson v. Hardcastle, 123 Nev. ___, ___, 163 P.3d 428, 438 (2007).

⁶See Moore v. Cherry, 90 Nev. 390, 393, 528 P.2d 1018, 1020 (1974) (recognizing that district courts must act “within the bounds of sound judicial discretion” when exercising their inherent authority).

⁷EDCR 1.30(b)(5).

⁸EDCR 1.33.

⁹EDCR 1.60(a).

¹⁰EDCR 3.10(b).

division, it does not limit the chief judge's authority under EDCR 1.30(b)(5), 1.60(a), and 3.10(b). However, the determination of a defendant's ongoing competency during trial must vest with the trial judge who has been assigned to hear the matter.

In reaching this conclusion, we recognize that "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial" are relevant factors in assessing competency.¹¹ Thus, any assignment of a competency determination to a different competency judge during trial would violate the United States Supreme Court's holding in Drope v. Missouri because a trial judge is the only adjudicator who can, among other things, assess firsthand a defendant's present ability to consult with his or her lawyer and determine whether a defendant's present behavior and demeanor during trial demonstrate that he or she is not competent to stand trial.¹²

Accordingly, we conclude that while the Eighth Judicial District Court may assign all initial competency determinations (NRS 178.415 and NRS 178.455) to a particular department within the district, the determination of a defendant's ongoing competency thereafter and

¹¹Drope v. Missouri, 420 U.S. 162, 180 (1975).

¹²See id. at 181 (stating that while a defendant may be competent at the commencement of trial, the trial court must always be alert to circumstances suggesting a change that would render the defendant incompetent to stand trial).

during trial must vest with the trial judge who has been assigned to hear the matter.¹³

The right to a hearing as to competency

Ferguson argues that the district court erred by not affording him a hearing to challenge the report as to competency under NRS 178.455 and NRS 178.460 after he returned from Lake's Crossing. Further, Ferguson argues that the district court's refusal to grant a hearing as to competency violated his due process rights because his right to a hearing is constitutionally guaranteed under Pate v. Robinson.¹⁴ Ferguson contends that in addition to his right to a hearing as to competency under NRS 178.460, which allowed him to examine and contest the report prepared by Lake's Crossing, he should have been afforded a hearing because counsel had also raised competency concerns as to his ability to aid and assist counsel at that time. Ferguson additionally argues that the proceeding that had taken place upon his return from Lake's Crossing was a "sham" hearing because his counsel was not present at that proceeding.

The State responds that a hearing as to competency was not required because, under Morales v. State,¹⁵ a hearing as to competency is required only when reasonable doubt as to the defendant's competency

¹³We further conclude that Ferguson's argument under EDCR 1.48 is without merit because Department 5 was not acting as a criminal division master in making competency determinations.

¹⁴383 U.S. 375 (1966).

¹⁵116 Nev. 19, 992 P.2d 252 (2000).

arises. The State argues that because defense counsel's motion for a competency hearing was supported by medical findings that were made prior to Ferguson's commitment to Lake's Crossing, defense counsel failed to present sufficient evidence that amounted to reasonable doubt as to Ferguson's competency after his return from commitment. Thus, the State contends that a hearing as to competency was not warranted. Further, the State argues that Ferguson's request for a hearing under NRS 178.460 was untimely.

In Morales, we reiterated our holding in Melchor-Gloria v. State¹⁶ and stated that "[w]here there is reasonable doubt regarding a defendant's competency, a district court's failure to order a competency evaluation constitutes an abuse of discretion and a denial of due process."¹⁷ Under Nevada law, a district court is required to suspend proceedings against a defendant at any time during the proceedings, "if doubt arises as to the competence of the defendant."¹⁸ If a defendant has been found incompetent and committed to Lake's Crossing, the Administrator of the Division is required to report his specific findings regarding the defendant's present ability to understand the nature of the charges, understand the nature and purpose of the proceedings, and aid

¹⁶99 Nev. 174, 660 P.2d 109 (1983).

¹⁷116 Nev. at 22, 992 P.2d at 254 (citing Ford v. State, 102 Nev. 126, 133, 717 P.2d 27, 31-32 (1986) and Melchor-Gloria, 99 Nev. at 180, 660 P.2d at 113); see also Pate, 383 U.S. at 385 (holding that the failure of the trial court to hold a hearing as to the competency of the accused to stand trial in a case in which the evidence entitled the accused to such a hearing deprived the accused of his constitutional right to a fair trial).

¹⁸NRS 178.405(1).

and assist counsel during the proceedings.¹⁹ NRS 178.460 provides that “the judge shall hold a hearing” concerning the Administrator’s report if such a hearing is requested within 10 days of receiving the report. Thus, upon a timely request, the district court must afford a defendant a hearing after the defendant has returned from a mental health facility such as Lake’s Crossing, which would allow counsel to examine and contest the report prepared by the treatment team. And as we have recently recognized in Calvin v. State,²⁰ evidence received at every stage of the competency proceedings may be relevant to the defendant’s competency and should be considered at such a competency hearing.²¹

Upon Ferguson’s return from Lake’s Crossing, Department 5 conducted a proceeding during which it concluded that Ferguson was competent to proceed to trial, despite Ferguson’s request for a continuance. The district court abused its discretion in denying this request for a continuance.²² While Ferguson was represented by counsel during that proceeding, the deputy public defender was not Ferguson’s counsel, but was “covering” for the deputy public defender that had been assigned to Ferguson’s case. Further, it is apparent that Ferguson had not been afforded a meaningful opportunity to confer with counsel prior to the proceeding. As Ferguson did not have a significant opportunity to

¹⁹NRS 178.455(1).

²⁰122 Nev. 1178, 147 P.3d 1097 (2006).

²¹Id. at 1183, 147 P.3d at 1100.

²²See Colgain v. State, 102 Nev. 220, 223, 719 P.2d 1263, 1265 (1986).

confer with his counsel prior to the proceeding and was not even represented by his assigned counsel at the hearing, Ferguson was denied a meaningful opportunity to be heard and was denied the meaningful opportunity to challenge the findings made in the Lake's Crossing report.²³

We further conclude that Department 5 abused its discretion in not granting a hearing as to competency upon defense counsel's motion. While the request for a hearing as to competency under NRS 178.460 may have been untimely in this case, a competency hearing was warranted because defense counsel had presented a challenge as to Ferguson not having the sufficient present ability to consult with counsel at that time. The motion was supported by evidence that raised sufficient doubt as to his competency to stand trial.²⁴ While defense counsel's arguments relating to Ferguson's competency were in part based on evaluations performed by doctors prior to Ferguson's commitment to Lake's Crossing, the evaluations had challenged whether Ferguson had the ability to ever regain competency. Additionally, defense counsel's proffered affidavit indicates that if there had been a hearing, defense counsel would have had a psychologist testify and opine that Ferguson was not competent to stand trial or assist counsel despite his treatment at Lake's Crossing. As such, Department 5 should have afforded defense counsel the opportunity to present their evidence relating to Ferguson's competency during a hearing; this evidence was relevant in addressing the ultimate issue of

²³See Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard.").

²⁴See Morales v. State, 116 Nev. 19, 22, 992 P.2d 252, 254 (2000).

whether Ferguson understood the nature of the proceedings against him and whether he could assist counsel in his defense.²⁵

CONCLUSION

We conclude that the Eighth Judicial District has the discretion to assign the determination of all competency matters to Department 5; however, the determination of a defendant's ongoing competency during trial must vest with the trial judge who has been assigned to hear the matter. We further conclude that the district court abused its discretion in denying Ferguson's request for a continuance upon his return from Lake's Crossing. Additionally, the district court's refusal to grant Ferguson a hearing as to competency upon his return from Lake's Crossing violated his right to a fair trial. While the request for a hearing as to competency under the relevant statute may have been untimely, a competency hearing was warranted in this case because defense counsel had raised reasonable doubt as to Ferguson not having the sufficient present ability to consult with counsel at that time.

Accordingly, we reverse the judgment of conviction and remand this matter for a new trial, so long as Ferguson is found to be

²⁵See Calvin, 122 Nev. at 1182-83, 147 P.3d at 1100.

competent to stand trial.²⁶

Douglas, J.
Douglas

We concur:

Gibbons, C.J.

Gibbons

Maupin, J.

Maupin

Hardesty, J.

Hardesty

Parraguirre, J.

Parraguirre

Saitta, J.

Saitta

²⁶In reaching our decision, we further conclude that Department 7 should have granted Ferguson a competency hearing when defense counsel filed their motion to strike all the rulings made by Department 5 and to compel a de novo hearing as to Ferguson's competency. Based on our review of the evidence supporting this motion, defense counsel had sufficiently raised doubt as to Ferguson's competency, as defense counsel's motion was supported by evaluations that had taken place after Ferguson's commitment to Lake's Crossing. Thus, in light of the new evidence presented by defense counsel, we conclude that Department 7 erred in yielding to Department 5's competency determination. Likewise, we conclude that Department 7's view that Department 5 would not consider any evidence relating to competency from any doctors who are not appointed by the district court violated our holding in Calvin, 122 Nev. at 1183, 147 P.3d at 1100.

CHERRY, J., concurring in part and dissenting in part:

I concur that appellant's judgment of conviction should be reversed and his case remanded for a new trial on the grounds set forth in the majority opinion.

I also agree with the majority that the determination of a defendant's ongoing competency during trial must vest with the trial judge who has been assigned to hear the matter.

My difference with the majority opinion concerns which judge hears a competency matter when a defendant has been committed to Lake's Crossing and is returning to district court after having been found competent to stand trial. I reluctantly agree with the majority that the Eighth Judicial District Court has the discretion to assign the determination of all initial competency matters to Department 5. However, it is my opinion that once a defendant has been committed to Lake's Crossing and is returned to the district court upon being found competent to stand trial, the appropriate member of the judiciary to determine competency is the trial judge rather than Department 5.

I have the greatest respect and admiration for both the district judge in Department 5 and the chief judge who has assigned initial competency matters to Department 5. I do realize the benefit both in terms of basic due process to the defendants involved in having competency determined as soon as possible and the preservation of judicial resources in using one judicial department to handle all initial competency matters coming from justice court or coming to district court immediately after the filing of an indictment.

However, once a defendant has been committed to Lake's Crossing and is returned to the district court upon being found competent to stand trial, the case appropriately belongs to the trial judge and not to Department 5. In this way the trial judge can continuously manage the ongoing criminal prosecution, including monitoring the defendant's mental status and possibly even resolving the matter with an appropriate plea bargain.

I, therefore, respectfully concur in part and dissent in part to the majority opinion in this case.

Cherry, J.
Cherry