IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY CUCCIA, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40188

FILED

FEB 18 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. Appellant Anthony Cuccia, Jr. was sentenced to life without the possibility of parole in addition to a consecutive term of life without the possibility of parole as an enhancement for the use of a deadly weapon.

Cuccia shot and killed Phillip Greenspan at the Stardust Hotel Race and Sports Book. Cuccia claims that the Mafia had a contract for murder out on him and that Greenspan was there to fulfill the contract. Accordingly, Cuccia claims to have killed Greenspan before Greenspan was able to kill him. Other than Cuccia's statements, no evidence was presented to the district court demonstrating that a contract for Cuccia's murder existed or that Greenspan posed a threat to Cuccia at the time of the murder.

On appeal, Cuccia alleges that substantial evidence does not exist to support the district court's finding that Cuccia was competent to stand trial. Due process demands that a person not be tried while he is incompetent.[1] The district court shall make a determination of

[1]Medina v. California, 505 U.S. 437, 458 (1992); see also NRS 178.400(1).

competency following a competency hearing.[2] The defendant has the burden at the district court of proving his incompetency by clear and convincing evidence.[3] The district court's findings will not be disturbed on appeal if they are supported by substantial evidence.[4]

"The test to be applied in determining competency is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational and factual understanding of the proceedings against him."[5] In Drope v. Missouri,[6] the Supreme Court noted, "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."[7] The

---

[2]NRS 178.415.

[3]Doggett v. State, 91 Nev. 768, 772, 542 P.2d 1066, 1068 (1975).

[4]Ogden v. State, 96 Nev. 697, 698, 615 P.2d 251, 252 (1980).

[5]Jones v. State, 107 Nev. 632, 637, 817 P.2d 1179, 1182 (1991); see also Dusky v. United States, 362 U.S. 402, 402 (1960); Doggett v. Warden, 93 Nev. 591, 593, 572 P.2d 207, 208 (1977). Cuccia suggests that this court adopt the guidelines for determining competency set out in State v. Guatney, 299 N.W.2d 538 (Neb. 1980), which provides a totality of the circumstances approach to determining competency. The Guatney factors have been adopted in other jurisdictions as a way to apply the test from Drope v. Missouri, 420 U.S. 162 (1975), and Dusky. See, e.g., State v. Shields, 593 A.2d 986, 1010-11 (Del. Super. Ct. 1990); State v. VanNatta, 506 N.W.2d 63, 66 (N.D. 1993); Bishop v. Superior Court, In & For Pima Cty., 724 P.2d 23, 28 (Ariz. 1986). We conclude that, even if we were to adopt the Guatney factors, the result in this case would not change.

[6]420 U.S. 162.

question whether a defendant is competent must be determined on a case-by-case basis.[8]

The relevant inquiry is whether the defendant had the ability to assist counsel, not whether he in fact chose to assist counsel or to comply with all of counsel's wishes.[9] A defendant does not have to be able to choose or suggest trial strategy to be competent,[10] because even fully competent defendants are not able to comprehend the intricacies of some of the defense theories offered by their lawyers.[11] Additionally, a defendant's refusal to heed sound legal advice is not necessarily convincing proof of the defendant's inability to assist counsel.[12]

We conclude that substantial evidence exists to support the district court's determination that Cuccia was competent to stand trial. Cuccia was determined to be competent to stand trial on two separate occasions after extensive evaluation by mental health professionals. At the competency hearing, Cuccia was able to explain the charges against him, and he reinforced that he was able to understand the nature of the proceedings by filing several motions on his own behalf. Additionally, both doctors that evaluated Cuccia agreed that he had the ability to assist his

---

. . . *continued*

[7]Id. at 171.

[8]Id. at 180.

[9]State v. Woodland, 945 P.2d 665, 668 (Utah 1997).

[10]State v. Benn, 845 P.2d 289, 307 (Wash. 1993).

[11]U.S. v. Hogan, 986 F.2d 1364, 1373 (11th Cir. 1993).

[12]Woodland, 945 P.2d at 669.

counsel, even if he chose not to provide that assistance. Since the relevant inquiry is whether Cuccia had the ability to assist his counsel, not whether he actually did, we conclude that substantial evidence supports the district court's finding that Cuccia was competent to stand trial.

Second, Cuccia contends the district court erred by finding Cuccia competent to waive his right to counsel. The United States and Nevada Constitutions guarantee a defendant the right to self-representation.[13] Denial of that right is per se reversible error.[14] However, before allowing a defendant to waive counsel and represent himself, the trial court must ensure that the defendant is competent and that the waiver of counsel is knowing, voluntary, and intelligent.[15]

The competency to stand trial is the same competency needed to waive the right to counsel.[16] However, "when a defendant seeks to waive his right to counsel, a determination that he is competent to stand trial is not enough; the waiver must also be intelligent and voluntary

---

[13]Wayne v. State, 100 Nev. 582, 584, 691 P.2d 414, 415 (1984).

[14]McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984).

[15]Faretta v. California, 422 U.S. 806, 835 (1975); see also Godinez v. Moran, 509 U.S. 389, 400-01 (1993).

[16]Godinez, 509 U.S. at 399 (1993). Cuccia argues the competency needed to waive counsel is higher than the competency needed to stand trial. However, the cases cited by Cuccia in favor of this argument all pre-date Godinez, which has been adopted by this court. See Johnson v. State, 117 Nev. 153, 164, 17 P.3d 1008, 1015 (2001); Furbay v. State, 116 Nev. 481, 485, 998 P.2d 553, 556 (2000); Harris v. State, 113 Nev. 799, 802, 942 P.2d 151, 153 (1997).

before it can be accepted."[17] This court will give deference to the district court's decision to allow the defendant to waive his right to counsel.[18]

As stated above, substantial evidence exists to support the district court's determination that Cuccia was competent to stand trial, thereby making Cuccia competent to waive his right to counsel.

Cuccia argues that his waiver was not voluntary since he only chose self-representation because defense counsel wanted to present an insanity defense against his wishes. However, Cuccia was informed that an insanity defense could not be presented over his objection. Therefore, even though the dispute between Cuccia and his defense counsel influenced Cuccia's decision to proceed pro se, Cuccia made his waiver knowing the defense could not be presented without his consent. Additionally, the district court conducted two Faretta canvases, showing that Cuccia understood the consequences of waiving his right to counsel. Accordingly, we conclude that the district court properly determined that Cuccia was competent to waive his right to counsel and that the waiver was knowing, voluntary and intelligent.

Third, Cuccia challenges this court's decision in Johnson v. State.[19] Cuccia claims a delusional defendant should not be able to direct his attorney to pose a "fictional and demonstratably untrue defense." Despite previously waiving his right to counsel, Cuccia had counsel

---

[17]Godinez, 509 U.S. at 402.

[18]Graves v. State, 112 Nev. 118, 124, 912 P.2d 234, 238 (1996).

[19]117 Nev. 153, 17 P.3d 1008.

represent him at trial. Cuccia insisted that his defense attorney argue self-defense, overcoming defense counsel's desire to argue insanity.[20]

"The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."[21] Therefore, a defendant who is competent to stand trial "has the absolute right to prohibit defense counsel from interposing an insanity defense."[22] The standard of competency for a defendant to choose his own defense is the same level of competency needed to stand trial.[23] This court is "not free to ignore United States Supreme Court precedent on a federal constitutional question."[24] It is reversible error when defense counsel raises a defense over the defendant's objection.[25]

Since Cuccia was competent to stand trial, he had the right to control his defense, even over the objections of defense counsel. Therefore, we conclude that substantial evidence exists to support that Cuccia was

---

[20]The record does not contain evidence to support either of these defenses. Cuccia does not meet the definition of insanity under the M'Naughten rule, as articulated in Finger v. State, 117 Nev. 548, 576-77, 27 P.3d 66, 85 (2001). Additionally, the record does not support self-defense because there is no evidence that Cuccia was in imminent danger at the time of the murder.

[21]Faretta, 422 U.S. at 819-20.

[22]Johnson, 117 Nev. at 163, 17 P.3d at 1015.

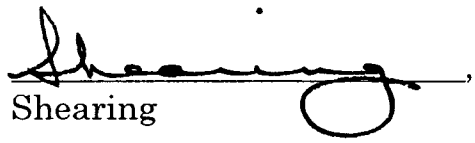
[23]Id. at 164, 17 P.3d at 1015.

[24]Id. at 164, 17 P.3d at 1016.

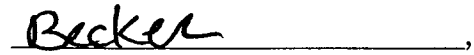
[25]Id. at 163, 17 P.3d at 1015.

competent to control his defense.[26] Having concluded Cuccia's contentions lack merit, we

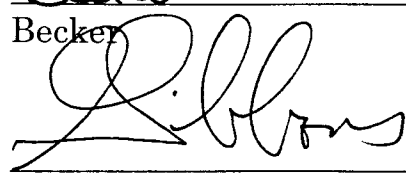
ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Shearing



_____, J.
Becker



_____, J.
Gibbons

cc: Hon. Jackie Glass, District Judge
Clark County Public Defender
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

---

[26]Having reviewed Cuccia's argument that allowing a defendant to choose his own defense over the objection of defense counsel presents an irreconcilable conflict with the attorney's ethical duties, we conclude it is without merit.