

IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRY JESS DENNIS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 41664

**FILED**

**MAR 12 2004**

ORDER DISMISSING APPEAL

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richard*  
CHIEF DEPUTY CLERK

This is an appeal from a district court order dismissing without an evidentiary hearing a first post-conviction petition for a writ of habeas corpus in a capital case.

Appellant Terry Jess Dennis was charged by information with first-degree murder with the use of a deadly weapon for the March 1999 willful, deliberate and premeditated strangulation killing of Ilona Straumanis. Dennis was evaluated by a psychiatrist, determined to be competent to stand trial, and entered a guilty plea to the charge against him. Prior to accepting his plea, the district court thoroughly canvassed Dennis, finding that he was competent to enter a plea and that his plea was knowingly and voluntarily entered. Ultimately, a three-judge panel sentenced Dennis to death.<sup>1</sup> Dennis directly appealed to this court, and we affirmed his conviction and death sentence.<sup>2</sup>

On April 10, 2001, Dennis filed in the district court a timely post-conviction petition for a writ of habeas corpus. The district court

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<sup>1</sup>Dennis v. State, 116 Nev. 1075, 1076-81, 13 P.3d 434, 435-38 (2000).

<sup>2</sup>Id. at 1087, 13 P.3d at 442.

appointed counsel, who supplemented the petition. On June 4, 2003, the district court dismissed the petition without an evidentiary hearing. After Dennis appealed to this court, the State moved for remand. The State's motion was based on letters Dennis addressed to the district court and the Washoe County District Attorney, dated September 9 and 17, 2003, respectively. In these letters, Dennis expressed his desire to withdraw this appeal and requested assistance in doing so, stating that he had shared with his counsel, Karla K. Butko, his desire to withdraw the appeal but Butko was "doing all she [could] to delay things."

This court granted the State's motion and remanded the matter to the district court for further proceedings to determine Dennis's competency and the validity of any waiver of this appeal. Butko then moved the district court for permission to withdraw from representation. The district court granted Butko's motion and appointed replacement counsel. The court then ordered a competency evaluation by a psychiatrist.

Dr. Thomas E. Bittker conducted the evaluation and in a written report opined that (1) Dennis "does have sufficient present ability to consult with his attorney with a reasonable degree of factual understanding"; (2) he "has a rational and factual understanding of the proceedings[,] . . . is fully aware of the charges that he confronts, the implication of the sentence, and has a full understanding of what is involved in the death penalty [and] is also aware of the legal options available to him and the consequences of his not proceeding with these options"; (3) he "is currently taking medications that are reasonable and consistent with the diagnosis of Bipolar Disorder, and his primary

psychiatric problems, alcohol, amphetamine, and cocaine dependence,<sup>3</sup> are contained by virtue of the total institutional control in his life"; and (4) "[t]he medications that he is taking are not having any unusual effect on [his] ability to make decisions in behalf of his own interest, and to cooperate with counsel or to participate in the court hearing." To these opinions, Dr. Bittker added,

[O]n the other hand, [Dennis] has sustained over years episodes of suicidal ideation, suicide attempts, and self-destructive behavior, which heralded both the instant offense and his current legal strategy. I believe, with a reasonable degree of medical certainty, that [Dennis's] desire to both seek the death penalty and to refuse appeals in his behalf are directly a consequence of the suicidal thinking and his chronic depressed state, as well as his self-hatred.

Clearly, an alternative to consider is whether or not [Dennis's] view of himself is simply a realistic incorporation of society's view of his "monstrous" behavior. On the other hand, it is conceivable and, in my mind, likely that both the defendant's offense and his current court strategy spring[] from his psychiatric disorder and his substance abuse disorder, that he wishes to die and he wishes to be certain of a reasonably humane death. Consequently, the death penalty, as provided by the state, is quite congruent with both his intent and his psychiatric disorder.

On December 4, 2003, the district court conducted a hearing at which Dennis was present with replacement counsel, Scott W. Edwards.

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<sup>3</sup>Dr. Bittker also diagnosed Dennis with a variety of other disorders, including post-traumatic stress disorder, attention deficit hyperactivity disorder and mixed personality disorder with antisocial, cyclothymic, borderline and schizoid features.

The district court thoroughly canvassed Dennis on the issues of his competence and waiver of rights. On December 22, 2003, the court entered a detailed, written order finding that Dennis was competent to waive his rights and to decide whether to forgo further litigation that might delay or overturn his execution and that he voluntarily, knowingly and intelligently waived his rights to pursue further relief, including this appeal.

Finally, on February 2, 2004, Dennis filed a motion to voluntarily withdraw this appeal.<sup>4</sup> In this motion, Dennis's counsel, Edwards, states that Dennis consents to the voluntary withdrawal of this appeal, having had the benefit of Edwards's explaining to him the legal consequences of withdrawing the appeal, including that he cannot hereafter seek to reinstate the appeal and that any issues that were or could have been brought in the appeal are forever waived. We determine whether to grant this motion after a careful review of the district court's determinations and the evidence on Dennis's competence and the validity of his waiver of rights.

First, however, we note that the Federal Public Defender (FPD) has filed a motion for leave to appear in this appeal as amicus curiae on Dennis's behalf. The State has opposed the motion. Having reviewed this motion, we are not convinced that we should permit the FPD to appear in this appeal as amicus curiae. The literal meaning of "amicus curiae" is friend of the court, i.e. one who interposes in a judicial proceeding to assist the court by giving information on a matter of law

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<sup>4</sup>See NRAP 42.

which might otherwise escape the court's consideration.<sup>5</sup> While the amicus may have some interest in the resolution of the action, it must not assume a partisan position; its status is only that of a neutral advisor.<sup>6</sup> Having considered the FPD's motion, we conclude that the FPD is not a neutral bystander or advisor but seeks to advocate directly on Dennis's behalf. Edwards remains Dennis's counsel of record and has not sought leave to withdraw, and the FPD has not sought leave of this court to appear as counsel of record on Dennis's behalf. It appears, therefore, that the FPD is seeking to represent Dennis without formally entering an appearance on his behalf as counsel of record. Accordingly, the FPD is not properly acting as counsel of record or as amicus curiae. We are not otherwise persuaded that the FPD's appearance will assist this court, and we thus deny the FPD's motion for leave to appear as amicus curiae.

Next, we conclude that substantial evidence supports the district court's determination that Dennis is competent to make a rational choice to forgo further and possibly life-saving litigation, including this appeal.<sup>7</sup> Specifically, the evidence, including the transcript of the district court's canvass at the December 4, 2003 hearing and Dr. Bittker's report, shows that Dennis has sufficient present ability to consult with counsel to

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<sup>5</sup>See, e.g., New England, Etc. v. University of Colorado, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979).

<sup>6</sup>See Dunkelbarger Const. Co. v. Watts, 488 N.E.2d 355, 360 (Ind. Ct. App. 1986).

<sup>7</sup>See Geary v. State, 115 Nev. 79, 82-83, 977 P.2d 344, 346 (1999) (setting forth considerations relevant to competency determination), cert. denied, 529 U.S. 1090 (2000); Calambro v. District Court, 114 Nev. 961, 971, 964 P.2d 794, 800 (1998) (same), cert. denied, 525 U.S. 1149 (1999).

a reasonable degree of factual understanding and has a rational and factual understanding of the proceedings.<sup>8</sup> Dr. Bittker's opinions, which appear somewhat wide-ranging, merit extended discussion here. At the December 2003 hearing, Dennis's counsel, Edwards, noted the evidence of Dennis's various mental disorders as well as the portion of Dr. Bittker's report attributing Dennis's desire to seek the death penalty and refuse further appeal to his depressed state and self-hatred. Based upon this evidence, Edwards questioned whether Dennis has the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation."<sup>9</sup> However, the district court conscientiously inquired further to resolve whether Dennis's various disorders affected his capacity. We are satisfied with the district court's assessment of the totality of evidence to determine that Dennis's mental disorders have not rendered him incompetent to waive his rights.

During the district court's canvass, Dennis denied that he reported to Dr. Bittker any suicidal ideation or hallucinations. He further denied having visual or auditory hallucinations.<sup>10</sup> He acknowledged past

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<sup>8</sup>See Geary, 115 Nev. at 83, 977 P.2d at 346 (citing Doggett v. Warden, 93 Nev. 591, 593, 572 P.2d 207, 208 (1977) (applying test for competence from Dusky v. United States, 362 U.S. 402, 402 (1960)).

<sup>9</sup>Quoting Rees v. Peyton, 384 U.S. 312, 314 (1966), cited in Calambro, 114 Nev. at 971, 964 P.2d at 800. See also Godinez v. Moran, 509 U.S. 389, 398 & n.9 (1993) (recognizing that there is no indication in Rees that its phrase "rational choice" means something different from "rational understanding" as used in Dusky, 362 U.S. at 402).

<sup>10</sup>In our previous opinion on direct appeal we noted that Dennis's records submitted at his sentencing showed that in 1995 he reported having audio hallucinations and was diagnosed with a substance-induced psychotic disorder at the time of one hospital admission. However, when

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suicidal feelings that were "usually behind alcohol" and past suicide attempts, but he denied feeling suicidal since having been imprisoned. Dennis indicated that he had been receiving medications in prison which had "pretty much squared [him] away." The record shows no suicide attempts by Dennis since the time of his 1999 guilty plea. In addition, Dennis was examined by a psychiatrist and was found competent prior to entry of his plea. The district judge who presided over the instant competency proceeding had also presided over the 1999 proceedings leading to Dennis's guilty plea and death sentence and was able to consider Dennis's cognitive abilities with that historical perspective.

Additionally, the transcripts from the December 2003 hearing indicate that Dennis was lucid during the canvass, understood the district court's questions and the purpose of the hearing, and answered the court's questions with intelligence and insight. The district court reviewed with Dennis the grounds raised in his habeas petition, and Dennis indicated that he was aware of and desired to give up his right to pursue all of these claims. Dennis showed a rational understanding of his legal position and the options available to him, including the claims raised in his habeas petition and the attendant legal proceedings, his right to proceed with this appeal, and the legal consequences of withdrawing the appeal and abandoning further litigation. He understood, specifically, that by choosing to waive his rights to pursue further relief he would face imminent execution. Dennis repeatedly expressed and remained steadfast in his desire to forgo further proceedings that might delay or stop his

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receiving medical treatment subsequent to 1995, Dennis denied having any hallucinations. Dennis, 116 Nev. at 1080 n.4, 13 P.3d at 437 n.4.

execution. At one point, he stated, "[My attorneys] about browbeat me to death, but no, I'm staunch in my decision." Finally, Dennis articulated rational reasons for choosing to forgo his legal challenges and be executed.<sup>11</sup> He explained, "[B]asically, I took a life and I'm ready to pay for that with mine," and "I would rather not live than continue to live and be a doddering old man in prison." In sum, the record demonstrates that Dennis's decision was "intelligently made and with full comprehension of its ramifications."<sup>12</sup> Furthermore, it is plain that Dennis is aware of his impending execution and the reason for it.<sup>13</sup>

The district court determined that "Dennis does not suffer from any disease or mental defect that prevents him from making a rational choice among his various legal options—including whether to pursue any further litigation that may save his life." Substantial evidence supports this factual finding as well as the district court's ultimate finding that Dennis is competent to waive his rights and determine whether to abandon further proceedings on his writ petition, including this appeal.<sup>14</sup>

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<sup>11</sup>See Ford v. Haley, 195 F.3d 603, 619-24 (11th Cir. 1999).

<sup>12</sup>Cole v. State, 101 Nev. 585, 588, 707 P.2d 545, 547 (1985).

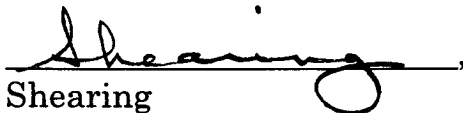
<sup>13</sup>See Calambro, 114 Nev. at 971, 964 P.2d at 800 (citing Demosthenes v. Baal, 495 U.S. 731, 733 (1990)).

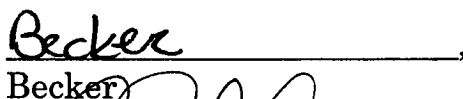
<sup>14</sup>Cf. Rumbaugh v. Procnier, 753 F.2d 395, 398-403 (5th Cir.) (upholding lower court's determination that defendant was competent despite concerns raised by reports from mental health professionals that defendant's mental illness influenced his decision to seek death), cert. denied, 473 U.S. 919 (1985); Calambro, 114 Nev. at 972, 964 P.2d at 801 (upholding district court's determination that defendant was competent where evidence showed he was basically rational though he exhibited borderline mental retardation, was probably to some degree schizophrenic and had a history of hearing voices).



We further conclude that ample evidence likewise supports the district court's determination that Dennis's waiver of rights and decision to withdraw this appeal are voluntary, not the result of any improper influence, and are knowingly and intelligently made. Thus, we grant Dennis's motion to voluntarily withdraw this appeal, and

ORDER this appeal DISMISSED.<sup>15</sup>

 C.J.  
Shearing

 J.  
Becker

 J.  
Gibbons

cc: Hon. Janet J. Berry, District Judge  
Scott W. Edwards  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Federal Public Defender  
Washoe District Court Clerk

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<sup>15</sup>We do not consider the FPD's arguments set forth in its proposed amicus brief; however, we direct the clerk of this court to file the FPD's brief and appendix received by this court on January 27, 2004.