

NO. 08-0027

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 87974

STATE OF OHIO

Plaintiff-Appellee

-vs-

BISWANATH HALDER

Defendant-Appellant

MEMORANDUM IN RESPONSE TO JURISDICTION

Counsel for Plaintiff-Appellee

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

THORIN FREEMAN (#0079999)
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

SARAH M. SCHREGARDUS
Office of the Ohio Public Defender
8 East Long St. 11th Floor
Columbus Ohio 43215

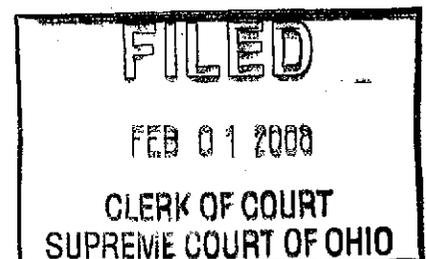


TABLE OF CONTENTS

Why This Felony Case is Not a Case of Great Public or General Interest and Does Not Involve a Substantial Constitutional Question	1
Statement of the case and facts	2
Law and argument	3
Proposed proposition of law I:	3
A defendant may not be found competent to stand trial if the defendant has proven by a preponderance of the evidence that the defendant cannot assist in his or her own defense, and no other competent evidence has been presented otherwise.	
Proposed proposition of law II:	4
A trial court must inquire into a defendant's request for self-representation before denying this constitutionally protected right.	
Proposed proposition of law III:	6
Given the advances in psychiatry and the increased general public acceptance of psychiatry over the past quarter century, a defendant in a criminal case has a due process right to present evidence of diminished capacity.	
Conclusion	8
Certificate of Service	9

Why This Felony Case is Not a Case of Great Public or General Interest
and Does Not Involve a Substantial Constitutional Question

Halder fails to advance any proposition that resolves questions created by this Court's jurisprudence. The basis of his propositions asks this Court to determine whether the trial court made proper credibility determinations or abused its discretion. The third proposition cannot be considered by this Court without resort to speculation and reliance on evidence not in the record or subjected to the adversarial process.

Halder fails to explain why his second proposition is of great general interest or raises a substantial constitutional question. This is because the second proposition is a request to review the trial court's findings for an abuse of discretion. The trial court relied on this Court's recent decisions in the area of self-representation.

The trial court and the Eighth District applied well-established caselaw to decide each proposition. This appeal presents no substantial constitutional questions or is it a case of great public interest. This Court should decline jurisdiction in this case

Statement of the case and facts

Biswanath Halder smashed his way into the Peter B. Lewis Building at Case Western Reserve University. Halder immediately killed Norman Wallace. Halder continued firing at every person in his path. As police and SWAT attempted to secure the building and remove hostages to safety, Halder attempted to kill every member of SWAT on several different occasions. After approximately eight hours and a weapons malfunction, Halder surrendered.

Halder was convicted of aggravated murder, attempted murder, kidnapping, burglary, and possession of a dangerous ordnance. He was sentenced to life without parole. His conviction was affirmed.

Law and argument

Proposed proposition of law I:

A defendant may not be found competent to stand trial if the defendant has proven by a preponderance of the evidence that the defendant cannot assist in his or her own defense, and no other competent evidence has been presented otherwise.

This proposition is the current law in Ohio. Halder wants this Court to substitute's its own credibility determinations for the ones made by the trial court. The trial court was presented with divergent opinions about Halder's competency to stand trial. The trial court carefully considered each expert's opinion and made credibility determinations based on knowledge, experience, and consistency. The trial court found Dr. Bergman the most credible expert and agreed with her that Halder was competent to stand trial.

If a finding of competence is based on some reliable credible evidence, that finding will not be disturbed absent an abuse of discretion.¹

Halder wants this Court to substitute its judgment for the experienced trial judge in this case. The trial court made detailed findings relating to the credibility of each doctor. The trial concluded that Dr. Bergman's testimony was the most credible because: 1) she had the most experience; 2) spent more time examining Halder; 3) makes more

¹ *State v. Hicks* (1989), 43 Ohio St. 3d 72, 79.

competency determinations in her position; 4) Bergman reviewed the raw data of the MMPI test and; 5) Dr. Bergman's review of all supplemental reports submitted by all experts. The decision to credit Dr. Bergman's testimony and find Halder did not meet his burden is based on competent, reliable, and credible evidence.

Halder does not approve of the trial court's decision and wants a different ruling. This proposition does not present a novel question of law. It is an attack on the trial court's credibility determination and subsequent findings based on credibility. This Court should not accept this issue for review.

Proposed proposition of law II:

A trial court must inquire into a defendant's request for self-representation before denying this constitutionally protected right.

Halder invites this Court to eliminate the requirement that a defendant timely and unequivocally state his desire to represent himself. He also asks this Court to substitute its judgment for the decision made by the trial court. This proposition disturbs recent precedent requiring a defendant to properly invoke a right of self-representation. This Court should not exercise jurisdiction over this issue.

If properly invoked, Halder has an absolute right to represent himself.² But Halder's request to represent himself was not proper because it was untimely and equivocal. Because Halder did not properly invoke his right to self-representation, the trial court was not required to engage Halder in a *Faretta* colloquy.

Halder requested to represent himself five days before trial. And the trial date had been set for approximately six weeks. During this time, Halder never requested to represent himself. In fact, he made countless motions to disqualify trial counsel and be represented by a different team of attorneys.

The trial court, relying on this Court's recent decision in *Vrabel* and *Cassano*, found that Halder failed to timely invoke his right of self-representation. Because Halder's request was untimely the trial court was not required to engage in a *Faretta* colloquy.

Halder also claims he made an unequivocal motion to represent himself. This claim falls flat when the *entire* record is reviewed. Five days before trial Halder moved to represent himself. But in the years preceding this statement he indicated that he did not wish to represent himself, because "he would be no match for the Prosecutor." The trial court was

² *State v. Vrabel* (2003), 99 Ohio St. 3d 184, 193, 2003-Ohio-3193 at ¶ 49; *State v. Cassano* (2002), 96 Ohio St. 3d 94, 2002-Ohio-3751

forced to make a factual determination of whether Halder was equivocating between self-representation and the right to counsel. And based on the entire record, the trial court correctly decided that Halder equivocated in his request to represent himself. Because Halder equivocated in his decision to represent himself no *Faretta* colloquy was necessary.

Halder asks this Court to substitute its judgment for an experienced trial judge that spent years with this case. This proposition does not clarify this Court's jurisprudence in the area of self-representation. This Court should decline jurisdiction.

Proposed proposition of law III:

Given the advances in psychiatry and the increased general public acceptance of psychiatry over the past quarter century, a defendant in a criminal case has a due process right to present evidence of diminished capacity.

This proposition asks this Court to reconsider a diminished capacity defense. Specifically, Halder argues that advances in psychiatry can assuage this Court's concern with a diminished capacity defense. But this assertion finds no supporting evidence in the record of this case. Because there is no evidence to support this claim this Court should reject this proposition.

This Court rejected diminished capacity in 1972.³ Ten years later this Court rejected the defense for a second time.⁴ This jurisprudence has not wavered—even in death penalty cases.⁵ And this Court recently rejected a similar proposition.⁶

Moreover, this record is devoid of any evidence to support the assertion that psychiatry has advanced to allow a diminished capacity defense. This Court has no evidence to review and reconsider the rejection of the amorphous defense of diminished capacity. Halder asks this Court to engage in speculation to reverse 35 years of jurisprudence. This Court should decline jurisdiction of this proposition.

³ *State v. Jackson* (1972), 32 Ohio St. 2d 203.

⁴ *State v. Wilcox* (1982), 70 Ohio St. 182.

⁵ *State v. Taylor*, 98 Ohio St. 3d 27, 39, 2002-Ohio-7017 at ¶ 69 (citations omitted).

⁶ *State v. Cockrell*, Ohio Supreme Court No. 2006-1280.

CONCLUSION

This Court's decision to accept or decline jurisdiction hinges on two factors

- the substance of Halder's first two claims do not present questions of great public interest or substantial constitutional questions because each one focuses on the trial court's credibility findings and decisions guided by discretion and;
- because Halder's third proposition is not supported by any record evidence this Court would be forced to speculate about advances in psychiatry to reverse 35 years of jurisprudence.

These propositions simply rehash well-established law and ask this Court to reverse rulings that Halder disagrees with. This Court's jurisprudence will not be advanced or clarified by these propositions and jurisdiction should not be exercised.

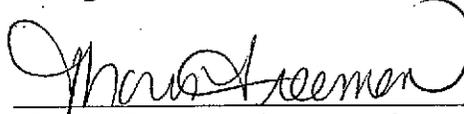
Respectfully submitted,
WILLIAM D. MASON,
CUYAHOGA COUNTY PROSECUTOR



RICHARD A. BELL (#0042151)
THORIN FREEMAN (#0079999)
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Response to Jurisdiction of Appellant was mailed by regular U.S. Mail on the 31st day of January 2008 to Sarah Schregardus Office of the Ohio Public Defender 8 East Long Street 11th Floor Columbus Ohio 43215.

A handwritten signature in cursive script, appearing to read "Thorin Freeman", written over a horizontal line.

Thorin Freeman (0079999)
Assistant Prosecuting Attorney