

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-03-046
- vs -	:	<u>OPINION</u> 12/12/2011
DONALD LAMPLEY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM HAMILTON MUNICIPAL COURT
Case No. 10CRB05206

Mary K. Dudley, Hamilton City Prosecutor, 345 High Street, 7th Floor, Hamilton, Ohio 45011,
for plaintiff-appellee

Christopher P. Frederick, 304 North Second Street, Hamilton, Ohio 45011, for defendant-
appellant

RINGLAND, J.

{¶1} Defendant-appellant, Donald Lampley, appeals his conviction and sentence in
the Hamilton Municipal Court for sexual imposition.

{¶2} In December 2010, appellant was charged with sexual imposition in violation of
R.C. 2907.06. The charge stemmed from an allegation that on December 16, 2010, while
stopping at an insurance agency to pick up an insurance policy, appellant grabbed the

buttocks of a female employee, told her he wanted to have "mixed babies" with her, and told her he wanted to lick her from head to toe. On February 1, 2011, following a bench trial before a magistrate (see Crim.R. 19[C][1][h]), appellant was found guilty as charged. Appellant filed objections to the magistrate's decision. At a hearing on the objections, appellant's trial counsel argued that once appellant referred to himself at trial as the Holy Ghost, the trial should have been halted and a competency evaluation should have either been requested by trial counsel or sua sponte ordered by the magistrate. On February 24, 2011, the trial court overruled the objections, found appellant guilty as charged, and sentenced him.

{¶3} Appellant appeals, raising the following two assignments of error:

{¶4} Assignment of Error No. 1:

{¶5} "APPELLANT WAS DENIED EFFECTIVE ASSISTANCE DUE TO TRIAL COUNSEL'S FAILURE TO QUESTION APPELLANT'S COMPETENCY TO STAND TRIAL AND REQUEST A COMPETENCY EVALUATION."

{¶6} Assignment of Error No. 2:

{¶7} "THE TRIAL COURT ERRED BY NOT SUA SPONTE RAISING THE ISSUE OF THE DEFENDANT'S COMPETENCE TO STAND TRIAL."

{¶8} At the heart of both assignments of error is appellant's claim that he was not competent to stand trial as evidenced by the fact he referred to himself at trial as the Holy Ghost and told the police he was the Holy Spirit.

{¶9} Fundamental principles of due process require that a criminal defendant who is legally incompetent may not be tried. *State v. Berry*, 72 Ohio St.3d 354, 359, 1995-Ohio-310. A defendant is incompetent if "because of [his] present mental condition, [he] is incapable of understanding the nature and objective of the proceedings against [him] or of assisting in [his] defense." R.C. 2945.37(G); *State v. Bock* (1986), 28 Ohio St.3d 108, 110.

"Incompetency must not be equated with mere mental or emotional instability or even with outright insanity. A defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel." *Bock* at 110.

{¶10} A defendant is presumed to be competent. R.C. 2945.37(G). The burden of rebutting this presumption and establishing incompetence by a preponderance of the evidence is upon the defendant. *State v. Bullocks*, Warren App. No. CA2010-01-008, 2010-Ohio-2705, ¶6, citing *State v. Williams* (1986), 23 Ohio St.3d 16.

{¶11} R.C. 2945.37(B) provides that "[i]n a criminal action in a court of common pleas, a county court, or a municipal court, the court, prosecutor, or defense may raise the issue of the defendant's competence to stand trial. If the issue is raised before the trial has commenced, the court shall hold a hearing on the issue * * *. If the issue is raised after the trial has commenced, the court shall hold a hearing on the issue only for good cause shown or on the court's own motion."

{¶12} "A trial court is not required to sua sponte order a hearing on a defendant's competence, and the right to such a hearing when actually requested by the defendant only 'rises to the level of a constitutional guarantee where the record contains sufficient indicia of incompetence.' Thus, absent a party's timely request to inquire into a defendant's competency, the trial court's decision to hold a competency hearing is discretionary." (Internal citation omitted.) *State v. Walker*, Mahoning App. No. 08 MA 103, 2009-Ohio-1503, ¶21. Further, "absent a request by counsel, or any indicia of incompetence, a competency evaluation is not required." *State v. Cowans*, 87 Ohio St.3d 68, 81, 1999-Ohio-250, certiorari denied (2000), 529 U.S. 1102, 120 S.Ct. 1839.

{¶13} In the case at bar, the issue of appellant's competence to stand trial was raised for the first time during the hearing on the objections. The record shows that appellant

testified in his own defense at trial. Appellant denied any physical contact with the victim, testified he was not arrested on the day of the incident because he was already in jail on an unrelated offense, and asserted that the sexual imposition allegations were made by the victim and her manager so that the manager would not have to pay appellant on a bet she had lost (this was the defense theory of the case). During cross-examination, the prosecutor confronted appellant about the discrepancy between his testimony and the record as to when he was arrested for the sexual incident and asked, "everybody is lying but you?" Appellant replied, "I'm the holy ghost, I don't lie."

{¶14} During the hearing on the objections, appellant's trial counsel indicated that before the trial, appellant told the police he was the Holy Spirit. Appellant's counsel did not explain in what context the statement was made. Appellant's counsel also stated that "in talking to [appellant] I believed he was lucid. I believe that we had * * * conversations that led me to believe that he was competent to stand trial. * * * But it appears from my way of opinion that agitation and stress brings that on with him."

{¶15} In overruling the objections, the trial court stated that appellant had appeared before the court on previous occasions for the sexual incident and that there was no indication then that he was not competent to stand trial. The trial court also indicated it had listened to the audio recording of the trial. With regard to the Holy Ghost comment, the trial court found that "it wasn't * * * something unrelated to that or something that was bizarre in a different way, it was directly about the * * * defense that was presented."

{¶16} Further, "from what I heard there was nothing to indicate that the defendant wasn't capable of assisting you, or that he didn't understand the nature of the charges. In fact, I find that he was very capable of assisting you because of the manner in which the co-defense (sic) was presented and that includes the defendan[t's] testimony about that. And in addition to that * * * I think he understood the nature of the charges. [N]othing about his

testimony would indicate that he didn't understand what he was accused of."

{¶17} Upon a thorough review of the record, we find that the trial court did not err in failing to sua sponte raise the issue of appellant's competence to stand trial. Given the definition of incompetency under R.C. 2945.37(G) and *Bock*, 28 Ohio St.3d 108, appellant's two isolated comments that he was the Holy Ghost or the Holy Spirit hardly demonstrate that he was not competent to stand trial or that a competency hearing was necessary. The comments, alone, are not sufficient to indicate a lack of competency. Further, "emotional stress and mental anguish * * * are not the type of incapacity that the competency rule intends to protect." *State v. Love* (Mar. 21, 1997), Lucas App. No. L-96-156, 1997 WL 133329, at *4.

{¶18} In addition, it is clear from the record that appellant understood the nature and objective of the proceedings, and that he was capable of assisting in his defense. In fact, appellant testified in his own defense at trial and was able to convey the defense theory of the case. The trial court had the benefit of observing and personally addressing appellant on previous occasions before the trial, and also had the benefit of listening to appellant's testimony at trial via the audio recording of the trial. At no time did appellant's behavior raise any question as to his competence. Further, neither the magistrate nor the trial court, or trial counsel or the prosecutor, ever expressed concerns on the record as to appellant's competence. "An appellate court when reviewing the record for indicia of incompetence should give deference to the trial court and those who saw and heard the proceedings in the courtroom." *State v. Plato*, Champaign App. No. 2003 CA 26, 2004-Ohio-5782, ¶37.

{¶19} Appellant also asserts he received ineffective assistance of counsel because his trial counsel failed to question his competency to stand trial and failed to request a competency evaluation.

{¶20} In order to establish ineffective assistance of counsel, appellant must show that

his trial attorney's performance was both deficient and prejudicial. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, certiorari denied (1990), 497 U.S. 1011, 110 S.Ct. 3258. With respect to deficiency, appellant must show that his counsel's performance "fell below an objective standard of reasonableness." *Strickland* at 688. A court considering a claim of ineffective assistance of counsel must apply a strong presumption that counsel's representation fell within the wide range of reasonable professional assistance. *Bradley* at 142. With respect to prejudice, appellant must show that there is a reasonable probability that, but for his counsel's unprofessional errors, the outcome of the proceeding would have been different. *Strickland* at 694. See, also, *Premo v. Moore* (2011), ___ U.S. ___, 131 S.Ct. 733.

{¶21} Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time. *State v. Rodriguez*, Butler App. No. CA2008-07-162, 2009-Ohio-4460, ¶68. Judicial scrutiny of an ineffective assistance claim must be highly deferential. *State v. Roy*, Butler App. No. CA2009-12-305, 2010-Ohio-5528, ¶9.

{¶22} There is no indication in the record that appellant's trial counsel had any difficulty communicating with appellant or vice versa. Appellant's trial counsel told the trial court that based upon his conversations with appellant, he believed appellant was lucid and competent to stand trial. As noted above, appellant clearly understood the nature and objective of the proceedings and was capable of assisting in his defense. Appellant did not display any indicia of incompetency to warrant a competency hearing or evaluation and there is nothing in the record to indicate he suffered from any form of severe mental disease or defect. Appellant's trial counsel's failure to question his competency to stand trial and to request a competency evaluation did not constitute deficient performance. See *Rodriguez*, 2009-Ohio-4460. We therefore find that appellant did not receive ineffective assistance of trial counsel.

{¶23} Appellant's first and second assignments of error are accordingly overruled.

{¶24} Judgment affirmed.

HENDRICKSON, P.J., and PIPER, J., concur.