

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2012-01-002
 :
 - vs - : OPINION
 : 11/13/2012
 :
 DARNELL DOLLAR, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2011-05-0647

Michael T. Gmoser, Butler County Prosecuting Attorney, Michael A. Oster, Jr., Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

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

RINGLAND, P.J.

{¶ 1} Defendant-appellant, Darnell Dollar, appeals his convictions and sentence in the Butler County Court of Common Pleas for two counts of felonious assault.

{¶ 2} Dollar was indicted after he assaulted two different women. On April 17, 2011, Dollar severely beat Tina Hall on her face, causing orbital fractures and other injuries to her head. On April 26, 2011, Dollar severely beat Amber Jackson on her face, causing a broken

nose and other injuries to her head. Dollar also stabbed Jackson in her leg with a sword he kept on his wall. He also refused to allow Jackson to leave his home after the beating, and kept her there for three days. Dollar was charged with three counts of felonious assault and two counts of kidnapping as a result of his crimes against Hall and Jackson.

{¶ 3} Dollar pled not guilty by reason of insanity to the charges, and the trial court ordered a forensic evaluation in order to determine the preliminary matter of whether Dollar was competent to stand trial. The record indicates, and there does not seem to be any dispute, that Dollar has "intellectual limitations in the Mild to Moderate range of Mental Retardation."

{¶ 4} The first forensic evaluation was performed by Dr. Kim Stookey, who had also performed three prior forensic evaluations on Dollar in relation to crimes he committed as a juvenile. Dr. Stookey reviewed Dollar's history as it related to his family situation, education, employment, social interactions, substance abuse, health, and involvement in the criminal process. Dr. Stookey focused much of her attention on Dollar's past involvement in the criminal process and noted that Dollar had numerous arrests as both a juvenile and as an adult. Dr. Stookey reported that Dollar had been evaluated six times to determine whether he was incompetent to stand trial in relation to past crimes. Each of the six prior evaluations had resulted in Dollar being found incompetent.

{¶ 5} Dr. Stookey performed a competency assessment specific to Dollar's assault charges, and found him incompetent to stand trial. Dr. Stookey based her finding on Dollar's "near complete lack of understanding of the roles of key courtroom officials and basic legal procedures;" not knowing or understanding the charges against him or the seriousness of the charges; as well as Dollar's inability to assist in his defense. Dr. Stookey submitted her report to the court on July 8, 2011.

{¶ 6} However, Dr. Stookey then filed an addendum to her report on August 4, 2011,

indicating that her opinion had changed based on her hearing several hours of phone calls between Dollar and various people that had been taped while Dollar was incarcerated. In Dr. Stookey's opinion, these recorded phone calls indicated that Dollar "possessed a better understanding of courtroom proceedings and had more sophisticated communication and reasoning skills than he portrayed" during the forensic evaluation. Dr. Stookey stated that Dollar's "intellectual deficits" still placed his overall intellectual ability in the Mild Range of Mental Retardation, but that she could no longer conclude "with the necessary level of confidence, that he is Incompetent to Stand Trial." Dr. Stookey recommended an additional evaluation over a longer period of time in order to determine whether Dollar was competent to stand trial. The trial court ordered a second forensic evaluation.

{¶ 7} The second evaluation was performed by Dr. Bobbie Hopes, who had evaluated Dollar on four previous instances. Dr. Hopes also reviewed Dollar's background information, as well as the previous forensic evaluations that had been performed in the past. Dr. Hopes reported that during her interview with Dollar, he acted "confused and in a daze," and that his answers to most all of her questions were "I don't know" or "I don't remember." Dr. Hopes noted that Dollar's behavior indicated "deliberate exaggeration or malingering."¹ Dr. Hope also listened to the taped phone calls, and noted that during his phone calls, Dollar was not dazed or confused, and seemed to understand the pending charges and their seriousness. Dr. Hopes concluded the report with her belief that Dollar "was deliberately exaggerating some aspects of his impairment during the current evaluation." However, Dr. Hopes declined to offer an opinion regarding Dollar's competency within a reasonable degree of psychological certainty because she did not feel that she had enough information based

1. Malingering has been defined as "the deliberate exaggeration of symptoms that are suggestive of mental illness or deliberate production * * * of symptoms suggestive of mental illness when in fact no mental illness exists." *State v. Neely*, 12th Dist. No. CA2002-02-002, 2002-Ohio-7146, ¶ 12.

on Dollar's unwillingness to cooperate in a meaningful and honest manner during the evaluation process. The trial court ordered a third forensic evaluation.

{¶ 8} The third forensic evaluation was performed by Dr. Barbara Bergman after Dollar was admitted to a behavior healthcare unit for 20 days. Dr. Bergman also reviewed Dollar's background, and noted that Dollar did not answer the questions posed to him during the evaluation. Dr. Bergman reported that Dollar claimed that he did not understand the question or did not know the answer to almost all of the questions posed to him. Dr. Bergman administered several tests, and determined that Dollar "is malingering when he portrays a very poor memory and/or low intelligence/difficulty understanding." Dr. Bergman went on to find that Dollar "appears to be greatly overexaggerating [sic] his cognitive impairments and is actually much more capable based on behavior observations of functional behavior * * *." Despite these findings, Dr. Bergman determined that Dollar was incompetent to stand trial because "it is not possible at this point to ascertain how much factual legal knowledge he is actually able to understand and how capable he is to consult with his attorney in the preparation of defense."

{¶ 9} After the final forensic evaluation was submitted, the trial court held a competency hearing, during which it heard testimony from Dollar's mother, Dr. Stookey and Dr. Hopes regarding their reports, and from Amber Jackson, the second victim. Dollar's mother testified that Dollar has had several evaluations in the past, and was always found incompetent to stand trial, and that Dollar had always had mental health issues. Jackson testified that she had known Dollar for several years before he attacked her, and that she lived with him at one point. Jackson testified that Dollar was able to do things for himself, including purchasing alcohol, going to the grocery store, cooking for himself, cleaning himself, and rolling his own marijuana cigarettes. Jackson also stated that she and Dollar routinely carried on full conversations with each other, often regarding "every day basis

things."

{¶ 10} Jackson testified that she and Dollar had a conversation a few days before he beat her regarding Dollar's criminal history and the fact that he was "in trouble" for what Jackson ultimately learned was Dollar having assaulted Tina Hall. Dollar told Jackson "over and over and over again[,] I'll get out of it, I'll get out of it." Jackson stated that Dollar told her that "he could do whatever he wanted, he would get off, they would send him to a behavioral unit, and he would get out."

{¶ 11} After hearing from the witnesses and considering all of the forensic evaluations, the trial court found Dollar competent to stand trial. The court then ordered Dollar to undergo a forensic evaluation specific to his plea of not guilty by reason of insanity. Dr. Stookey evaluated Dollar, and then submitted a report recommending that Dollar be found sane. Before the trial began, Dollar withdrew his not guilty plea and pled guilty to two counts of felonious assault, with all other counts merged. The trial court sentenced Dollar to five years on each count, to be served consecutively, for an aggregate sentence of 10 years. Dollar now appeals his convictions and sentence, raising the following assignments of error:

{¶ 12} Assignment of Error No. 1:

{¶ 13} THE TRIAL COURT VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS WHEN IT FOUND THE DEFENDANT-APPELLANT COMPETENT TO STAND TRIAL.

{¶ 14} Dollar argues in his first assignment of error that the trial court erred by finding him competent to stand trial.

{¶ 15} Due process and fundamental fairness demand that a criminal defendant who is not competent to stand trial not be tried and convicted of an offense. *State v. Murphy*, 173 Ohio App.3d 221, 227, 2007-Ohio-4535, ¶ 28 (12th Dist.), citing *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, ¶ 114. However, a defendant who is emotionally disturbed or

who has mental health issues is not automatically rendered incompetent to stand trial. *State v. Hessler*, 90 Ohio St.3d 108, 125 (2000); see also *State v. Stanley*, 121 Ohio App.3d 673 (1st Dist. 1997).

{¶ 16} According to R.C. 2945.37(G), a criminal defendant is presumed to be competent to stand trial. A defendant who claims he is not competent has the burden of proving his incompetence by a preponderance of the evidence. *State v. Bullocks*, 12th Dist. No. CA2010-01-008, 2010-Ohio-2705, citing *State v. Williams*, 23 Ohio St.3d 16, 19 (1986). An appellate court will not disturb a competency determination if there was "some reliable, credible evidence supporting the trial court's conclusion that [the defendant] understood the nature and objective of the proceedings against him." *Williams* at 19.

{¶ 17} The adequacy of the "data relied upon by the expert who examined the [defendant] is a question for the trier of fact." *Id.* "Deference on these issues should be given 'to those who see and hear what goes on in the courtroom.'" *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, ¶ 46, quoting *State v. Cowans*, 87 Ohio St.3d 68, 84 (1999).

{¶ 18} In support of Dollar's argument that he proved his incompetence by a preponderance of the evidence, Dollar points to Dr. Bergman's forensic evaluation and the fact that she recommended an incompetency determination. However, the Ohio Supreme Court has determined that a trial court is permitted to disagree with an expert's opinion on competency where the trial court's decision is supported by evidence in the record, and by the court's own observations of the defendant. *Were*, 2008-Ohio-2762 at ¶ 52.

{¶ 19} The trial court, as the trier of fact, was in the position to determine the adequacy of the data relied up by the forensic evaluator. The trial court found Dr. Bergman's report lacking, and that the report did not, by a preponderance of the evidence, establish Dollar's incompetency, especially in light of other evidence in the record indicating that Dollar was competent. We find no error in this conclusion.

{¶ 20} Dr. Bergman's report specifically stated that Dollar refused to engage in the forensic interview process, and that he exaggerated his lack of understanding regarding basic intake questions when he was admitted to the evaluation process. When various parties interviewed Dollar, including a psychiatrist and social worker, Dollar responded to their questions with "I don't know" or "I don't remember" but was able to accurately recall his and his family's addresses and phone numbers. Dr. Bergman reported that the psychiatrist who spoke to Dollar questioned whether Dollar was malingering based on his inability or unwillingness to answer questions.

{¶ 21} Further, Dr. Bergman reported that the results of the Test of Memory Malingered indicated that Dollar was malingering "when he portrays a very poor memory and/or low intelligence/difficulty understanding." Dr. Bergman further concluded that while Dollar was in the range of mild mental retardation, he "appears to be greatly overexaggerating [sic] his cognitive impairments and is actually much more capable based on behavioral observations of functional behavior * * *." Moreover, Dr. Bergman found that Dollar "endorsed a high frequency of symptoms that are highly atypical in patients with genuine psychiatric or cognitive disorders." More specifically, Dr. Bergman found that Dollar exaggerated his intellectual deficits and cognitive incapacity by "using the strategy of failing simple fund of knowledge items that even those with cognitive limitations would answer correctly."

{¶ 22} Dr. Bergman also reviewed several hours of phone calls between Dollar and his family and friends, as recorded by the jail. During these phone calls, Dollar discussed the following issues: wanting more money for telephone calls and to use in the commissary, the pending charges against him and having been indicted, the need to meet with a lawyer, the possibility of a plea bargain, the chances of receiving the maximum sentence based on the fact that the crimes were his first felony charges, wanting to meet with a lawyer to get himself

"out of trouble," wanting several people to appear at court on his behalf as witnesses, needing his family's help while he is imprisoned, needing evidence of calls made from an old cell phone, his concern about going to prison for 15-26 years if he did not obtain helpful evidence, concerns that he would "go nuts" if he were sentenced to 15 years, that his lawyer was trying to beat "this shit," instructing his brother to procure their mother's help, his being worried about "this case shit," that the victim called and lied to the mother of his child by reporting that he had been arrested for rape and felonious assault, and responding to his brother's question regarding the incompetency status by stating "you know that was an act – right?"

{¶ 23} Despite stating her "reasonable degree of confidence" that Dollar was exaggerating his mental deficits and that Dollar "is actually more capable than he demonstrates," Dr. Bergman concluded that Dollar was incompetent. Dr. Bergman based her opinion on the past findings of incompetency, as well as the fact that Dollar did not cooperate in the evaluation process so that she was unable to ascertain how much factual legal knowledge Dollar was actually able to understand.

{¶ 24} The trial court found, and we agree, that Dr. Bergman's report was not sufficient to prove by a preponderance of the evidence that Dollar was incompetent. Instead, there are two fundamental flaws in Dr. Bergman's approach to her evaluation: (1) Dollar was presumed to be *incompetent* because there was insufficient evidence in her mind to prove that he was competent; and (2) Dollar had been found incompetent in the past so that he must be found incompetent now. R.C. 2945.37(G) specifically invalidates these two approaches.

{¶ 25} R.C. 2945.37(G) specifically states,

A defendant is *presumed to be competent* to stand trial. If, after a hearing, the court finds by a preponderance of the evidence that, because of the defendant's *present mental condition*, the

defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense, the court shall find the defendant incompetent to stand trial and shall enter an order authorized by section 2945.38 of the Revised Code.

(Emphasis added.)

{¶ 27} Dr. Bergman reasoned that because Dollar did not cooperate with her evaluation by providing truthful answers, she did not have sufficient evidence to determine how much legal knowledge Dollar had. However, the statute very clearly states that a defendant is presumed competent, and has the burden to prove that he is incapable of understanding the nature and objective of the proceedings or of assisting in his defense. The fact that Dollar did not volunteer enough information so that Dr. Bergman could make this determination, however, does not equate to a finding of incompetence. Moreover, the record indicates that Dollar did have an understanding of the nature or objective of the proceedings, and was able to aid in his defense. During Dr. Stookey's testimony at the competency hearing, she described how her opinion changed after listening to the phone calls regarding Dollar's ability to understand the nature of the charges and proceedings.

In his phone calls, he demonstrated an understanding of the role of the judge and an attorney and what witnesses do in court. He understood what an indictment was, and the process of setting bond and using witnesses at trial, plea bargaining, and he understood what probationary supervision was.

* * *

He repeatedly referenced how this was a serious charge, and he was going to go away for a very long time and his family needed to help him, and he needed to get this evidence. It was very clear to him that he was going to go away for a long period of time if he was convicted.

{¶ 28} During the phone calls, Dollar is heard discussing that the charges against him were felonies, that he could receive between 15-26 years in prison, that he would go "nuts" if he were to be sentenced to 15 years, and addressing the possibility of receiving the

maximum sentences despite the fact that the charges were the first felony charges levied against him as an adult. These discussions clearly indicate that Dollar understood the charges against him.

{¶ 29} Dollar also discussed several issues that indicate he would have been able to aid in his own defense. Dollar discussed the need to get a lawyer, that he wanted to meet with a lawyer to get him "out of trouble," and that he wanted several people to appear in court as witnesses on his behalf. Moreover, Dollar implored his brother to print out a call log from an old cell phone, believing that the log would be helpful evidence. These statements also indicate that Dollar would have been able to aid in his own defense.

{¶ 30} In addition to the reports, the trial court also considered the testimony from Amber Jackson regarding Dollar's abilities. Jackson testified that Dollar was able to care for himself, purchased alcohol and other groceries on his own, carried on conversations with people, and rolled his own marijuana cigarettes. Moreover, Jackson testified that Dollar told her that he could do whatever he wanted and would "get off" for it.

{¶ 31} Regarding Dr. Bergman's assessment of the past evaluations and recommendations of incompetency, R.C. 2945.37(G) states that the trial court must focus on the defendant's "present mental condition" when determining incompetency. The mere fact that Dollar had been deemed incompetent to stand trial in the past did not automatically indicate that his present mental condition currently rendered him incompetent to stand trial. In fact, several of the past evaluations were specific to crimes Dollar committed as a juvenile, and years had passed since the time of those reports.

{¶ 32} After reviewing the record, we find that the trial court's findings were based on evidence rendered from the state's witness, consideration of the multiple forensic evaluations, and its own observations of the defendant based on the telephone calls. Thus, reliable and credible evidence supports the trial court's decision regarding Dollar's

competency determination. As such, Dollar's first assignment of error is overruled.

{¶ 33} Assignment of Error No. 2:

{¶ 34} DEFENDANT-APPELLANT PLEAS OF GUILTY WERE NOT GIVEN KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY.

{¶ 35} Dollar argues in his second assignment of error that the trial court erred in accepting his guilty pleas.

{¶ 36} As stated by the Ohio Supreme Court, "the competency standard for standing trial is the same as the standard for pleading guilty or waiving the right to counsel." *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, ¶ 57, citing *Godinez v. Moran*, 509 U.S. 389, 113 S.Ct. 2680 (1993). "A finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to plead guilty * * *. In addition to determining that a defendant who seeks to plead guilty * * * is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary." *Moran* at 400.

{¶ 37} According to Crim.R. 11(C)(2),

In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt

beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

{¶ 38} Dollar contends that he was incompetent to offer a plea because Dr. Bergman's report indicated that he was incompetent to stand trial. However and as previously stated, the trial court properly found Dollar competent to stand trial. Therefore, Dollar was also competent to plead guilty to the charges.

{¶ 39} Although Dollar does not argue that the trial court failed to properly perform the Crim.R. 11 colloquy, a review of the record indicates that the trial court properly advised Dollar of the nature of the charges and the maximum penalty involved, the effect of the plea, as well as all of the rights Dollar was waiving by pleading guilty. The record indicates that Dollar understood the consequences of his plea and understood what rights he was waiving. Therefore, we cannot say that Dollar's plea was anything but knowingly and voluntarily made. Dollar's second assignment of error is overruled.

{¶ 40} Judgment affirmed.

PIPER and YOUNG, JJ., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.