[Cite as *State v. Moss*, 2011-Ohio-702.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94433

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAMON MOSS

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-493650-A

BEFORE: Celebrezze, J., Kilbane, A.J., and Cooney, J.

RELEASED AND JOURNALIZED: February 17, 2011

ATTORNEY FOR APPELLANT

Kevin M. Cafferkey
2000 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Matthew V. Ezzo
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Damon Moss, appeals his convictions for aggravated robbery, kidnapping, and having a weapon under disability. He alleges that his right to confront witnesses was violated when the state played two 911 calls for the jury. He also alleges that he was incompetent to stand trial and that the verdicts are against the manifest weight of the evidence. After a thorough review of the record and law, we find that the trial court abused its discretion in finding that appellant was competent to stand trial.

Statement of the Facts

{¶ 2} James Buford and Trennel Bailey were test-driving a car Bailey was interested in purchasing when they spotted a similar vehicle in a parking lot with a "for sale" sign posted in its window. They stopped and called the number posted on the sign. The seller,[1] who was inside a nearby bar, arranged to meet Buford and Bailey. The seller was in the process of showing Bailey the vehicle when a burgundy van pulled up and appellant jumped out. Appellant fired one or two shots from a semi-automatic handgun into the air and demanded the three men to "throw down." Buford testified that he threw $300 on the ground, which a person in the passenger side of the van picked up. Bailey said he threw down his jacket and his wallet, but because his wallet was on a long chain, it did not hit the ground and no one took it or the money inside. Appellant got back into the van and drove off.

{¶ 3} The seller and Bailey went into the bar to call the police, and Buford ran off in another direction to get away from appellant. After telling the bartender to call the police, the seller and some other individuals got into the seller's vehicle and pursued appellant. Officer Charles Russell testified that he was stopped by one of the victims shortly after the robbery and was told to pursue a burgundy van. Officer Russell caught up to the van just as

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[1]This victim did not testify at trial.

appellant and the other individual stopped and got out. When the officer turned on his lights and siren, they ran off. Officer Paul Fronkoviak testified that a search of the area was initiated, and he found appellant hiding in a dumpster two blocks away from where the van was abandoned. No gun was ever found. Shortly after capture, Bailey and Buford were asked to meet with the police and were shown appellant, who was seated in the back of a police car. Both men identified appellant as the man who had robbed them at gunpoint.

{¶ 4} Appellant was indicted in an eight-count indictment for three counts of aggravated robbery,[2] two counts of having a weapon while under disability,[3] and three counts of kidnapping.[4] Trial was significantly delayed due to questions regarding appellant's competency to stand trial. Appellant was twice referred to Northcoast Behavioral Health Care Center ("Northcoast") for restoration of competency. On June 16, 2009, a hearing to determine appellant's competency was held where Dr. Edward Poa testified that, based on his evaluation, appellant was able to understand and

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[2] R.C. 2911.01, first degree felonies. These counts carried one- and three-year firearm and repeat violent offender specifications as well as notices of a prior conviction.

[3] R.C. 2923.13, third degree felonies. These counts carried one- and three-year firearm specifications.

[4] R.C. 2905.01, first degree felonies. These counts carried one- and three-year firearm specifications.

participate in the proceedings against him. Appellant's counsel raised issues he alleged were new or more severe and requested additional evaluation in light of the new symptoms and two-month span since Dr. Poa's evaluation. The trial court determined that appellant was fit to stand trial and another evaluation was unnecessary at that time.

{¶ 5} Prior to trial, appellant objected to the identification procedure used against him as well as the state's proposed use of 911 tapes at trial. The court overruled both objections. A bifurcated trial commenced where the aggravated robbery and kidnapping charges were tried to a jury, and the specifications and weapon under disability charges were tried to the judge. At the close of the state's case, appellant's Crim.R. 29 motion was granted as to the repeat violent offender specifications. Trial concluded in findings of guilt for the charges of aggravated robbery, kidnapping, having a weapon while under disability, and the remaining specifications.

{¶ 6} Appellant was sentenced to six-year terms of incarceration for each count of aggravated robbery and kidnapping. However, each kidnapping charge merged with its respective aggravated robbery charge. These terms were to be served concurrently to one another, but consecutively to a one-year term of incarceration for having a weapon while under disability and three-year gun specification, for an aggregate prison term of ten years.

{¶ 7} Appellant timely appealed, assigning four errors for our review.

Law and Analysis

Competency

{¶ 8} Appellant argues that "[t]he trial court denied [him] due process by failing to order a subsequent competency evaluation after new, relevant evidence came to the court's attention[,]" and "[t]he trial court's conclusion that [he] was competent to stand trial is not based upon competent, credible evidence."

{¶ 9} Due to fundamental due process principles, a criminal defendant cannot be subject to trial if he is deemed legally incompetent. *State v. Berry*, 72 Ohio St.3d 354, 359, 1995-Ohio-310, 650 N.E.2d 433. The test for determining whether a defendant is competent was set forth in *Dusky v. U.S.* (1960), 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824. Pursuant to *Dusky*, "[t]he test must be 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 as well as factual understanding of the proceedings against him." Id.

{¶ 10} R.C. 2945.37(B) recognizes an offender's right not to be tried while legally incompetent and provides in relevant part 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 as provided in this section."

{¶ 11} "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 [his] 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." R.C. 2945.37(G).

{¶ 12} Although the standard for determining competency to stand trial is the same as the standard of competence necessary to enter a guilty plea, the burden of establishing incompetence in this context is upon the defendant. *State v. Halder*, Cuyahoga App. No. 87974, 2007-Ohio-5940, ¶28. As an appellate court, we review the trial judge's determination of competence for an abuse of discretion. Id. at ¶29. To constitute an abuse of discretion, the ruling must be more than legal error; it must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 450 N.E.2d 1140.

{¶ 13} In this matter, the record indicates that the 35-year-old appellant has experienced auditory hallucinations and suffered from delusional beliefs since he was 17 years old. These beliefs apparently relate back to the time of the suicide of his friend, Darren, and

have remained fixed. The record further demonstrates that appellant has been hospitalized multiple times at various facilities throughout Ohio. He has also received outpatient care at Murtis Taylor and Bridgeway. Records from the Columbus Area Mental Health Center indicate that in 2002 and 2003, appellant was diagnosed with schizophrenia, chronic undifferentiated type. Medical records from Netcare also indicate that he was diagnosed with schizophrenia in 2002. St. Vincent Charity Hospital medical records from April 2003 indicate that he was experiencing active hallucinations and disorganization.

{¶ 14} The record further indicates that competency evaluations undertaken in connection with unrelated court proceedings in 2006 indicated that appellant was suffering from schizophrenia. He was found to be incompetent to stand trial in that matter.

{¶ 15} With regard to the pending case, the record indicates that appellant was referred to the Court Psychiatric Clinic for competency and sanity evaluations on April 2, 2007. On April 19, 2007, he was observed to be "actively psychotic, experiencing visual and auditory hallucinations." On May 14, 2007, he was found to be incompetent to stand trial and was referred to Northcoast for treatment and restoration to competency.

{¶ 16} The record further indicates that in a March 2008 evaluation, Dr. Michael Christie concluded that appellant was competent. However, this report indicated that "Mr. Moss continued to experience auditory hallucinations and delusional thinking * * * [and] was not able to discuss possible defenses to the charges in a reason and reality-based manner. His

discussion was delusional and illogical. This suggests that he will not be able to participate meaningfully in the decisions concerning his charges."

{¶ 17} On May 27, 2008, appellant was again referred to the Court Psychiatric Clinic for a competency evaluation. He refused to participate, and the clinic was unable to render an opinion regarding his competency. Upon further review by the Court Psychiatric Clinic in June 2008, Dr. Robindra Paul ("Dr. Paul") was unable to render an opinion about appellant's competency, so he was again referred to Northcoast for further assessment. Dr. Paul noted that there was evidence that appellant was not presently capable of understanding the nature and objective of the proceedings against him and not presently capable of assisting his attorney in his defense.

{¶ 18} On September 2, 2008, he was again referred to Northcoast for an inpatient competency evaluation. At this time, he was diagnosed with schizophrenia and malingering.

{¶ 19} In early 2009, the trial court re-referred appellant for an evaluation of competency and sanity, and on March 31, 2009, Dr. Edward Poa determined that he was suffering from schizophrenia. He also determined that the "weight of the evidence [was not] strong enough to give a conclusive diagnosis of Malingering." At that time, the Court Psychiatric Clinic concluded that, despite appellant's symptoms of schizophrenia, he was able to understand the proceedings against him and assist in his defense.

{¶ 20} On June 16, 2009, the trial court held a competency hearing. At the start of the hearing, appellant's trial counsel requested that the trial court re-refer appellant for further psychiatric evaluation and testing or, in the alternative, for an independent evaluation. Appellant's trial counsel notified the court that appellant had expressed concerns about his imaginary friend, "Darren"; had stated that he was hungry because "Darren" had eaten his sandwich; and that he obsesses about counsel's shoes. Counsel also stated that he had not had any opportunity to discuss the merits of the charges with appellant because of his mental health issues and inability to assist in his defense.

{¶ 21} Dr. Poa testified that he examined appellant on March 31, 2009 and determined from that examination that he was both sane and competent to stand trial on that date.

{¶ 22} On cross-examination, Dr. Poa was unable to determine if appellant was presently competent because it had been two months since his last evaluation. Dr. Poa testified that his opinion, based upon the March 31, 2009 examination, would change if, due to mental illness, appellant had been unable to communicate with his counsel and assist in his defense. He also acknowledged that his opinion may change if he learned that appellant was experiencing auditory hallucinations or was obsessed with shoes.

{¶ 23} Dr. Poa further stated that appellant suffers from schizophrenia, and that it is possible for him to experience a recurrence of symptoms, even while on medication. He

further stated that the clinical course for schizophrenia can be difficult to predict, and it is possible for a patient to experience residual hallucinations.

{¶ 24} Although Dr. Poa stated that he did not believe it was necessary to re-examine appellant based upon counsel's statements regarding appellant's present condition, he admitted that during the March 2009 examination, appellant mentioned "Darren" approximately 20 times. Dr. Poa further stated

{¶ 25} that he believed that appellant was forthcoming about his symptoms, and he did not diagnose defendant as malingering.

{¶ 26} Finally, Dr. Poa admitted that appellant has suffered with schizophrenia for approximately 20 years, that he receives governmental assistance as a result of his mental illness, and he has been hospitalized on numerous occasions for mental issues.

{¶ 27} At the conclusion of the June 16, 2009 hearing, the trial court determined that appellant was competent and stated: "He's been reviewed several times in the past year. Each time he's been reviewed, he has been opined to be competent and sane."

{¶ 28} We find this conclusion to be contrary to appellant's extensive history of mental illness, the May 14, 2007 determination that he is incompetent to stand trial, and the March 31, 2009 determination of competency, which Dr. Poa admitted could not be relied upon to demonstrate that appellant was presently competent in light of the lapse of time from the evaluation to the court hearing.

{¶ 29} Trial was subsequently continued to October 28, 2009. On that date, appellant's trial counsel again requested that the Court Psychiatric Clinic re-examine appellant or, in the alternative, that the court authorize the defense to obtain an independent psychiatric evaluation.

{¶ 30} The trial court denied both requests and stated: "Back in three or four weeks before they came up with that report, the diagnosis at that time was malingering based upon the observed inconsistencies between the reported symptoms and behaviors and zealous thrusting forth symptoms to evaluators, psychological testing, and absence of symptoms while being unobtrusively observed. * * * In all the evaluations, from Northcoast and also from the Court Psychiatric Clinic was that he was competent to stand trial in this matter."

{¶ 31} Again, we find this conclusion to be contrary to appellant's extensive history of mental illness and the May 14, 2007 determination that he was incompetent to stand trial. Although Dr. Poa opined, following the March 31, 2009 evaluation, that appellant was competent, he admitted that he would not rely upon this determination to demonstrate that appellant was presently competent. Further, all of the evidence of record from that point onward indicates that appellant was exhibiting symptoms of his mental illness and could not assist in the preparation of his defense.

{¶ 32} In accordance with all of the foregoing, we find that the trial court abused its discretion in finding appellant to be competent to stand trial as this conclusion is unsupported

by reliable and credible evidence. It is undisputed in the record that appellant has experienced auditory hallucinations and suffered from delusional beliefs for almost half of his life. He has been hospitalized multiple times and has received outpatient treatment going back to 2002, and he has previously been determined to be incompetent to stand trial in another matter. Further, the March 31, 2009 determination finding him competent was over six months old at the time of trial, and Dr. Poa stated that he could not conclude that appellant was presently competent solely by relying upon that report. Finally, with regard to the trial court's conclusion that appellant is malingering, Dr. Poa determined that the weight of the evidence did not indicate that he was malingering. Accordingly, appellant's first assignment of error is well taken and requires reversal of his conviction and remand for a new trial.

{¶ 33} Appellant's remaining assignment of error is rendered moot by our analysis above. App.R. 12(A)(1)(c).

{¶ 34} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

MARY EILEEN KILBANE, A.J., and
COLLEEN CONWAY COONEY, J., CONCUR