

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

PATRICK COLEMAN

APPELLANT

VS.

NO. 2009-KA-1350-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT O F ISSUES

- I. THE TRIAL COURT'S DENIAL OF COLEMAN'S MOTION FOR A CONTINUANCE TO SUBPOENA UNNAMED WITNESSES FOR A COMPETENCY HEARING ON THE MORNING OF TRIAL AFTER THE JURY VENIRE HAD BEEN SEATED IS NOT REVERSIBLE ERROR WHERE THE PURPOSE OF RULE 9.06 WAS SATISFIED.
- II. COLEMAN DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

STATEMENT OF FACTS

On the afternoon of November 28, 2007, Kimberly Watts, Frederick Pruitt, Caarda Turner, and Trevoris Griffin were socializing at Watts's apartment when two armed men approached Turner's apartment. T. 80, 83. One of the men, Patrick Coleman, lived with his family in an apartment across the street from Watts. T. 84. Watts informed the armed men that they were not welcomed in her home. T. 85. Coleman, believing that Pruitt had disrespected his wife earlier that morning, demanded that Watts "Put the mother fucker out." T. 85. Coleman repeated his demand before entering Watts's apartment and shooting Pruitt in the head. T. 86, 88-89. Coleman was ultimately indicted, tried, and found guilty of murder.

Prior to trial, the trial court granted Coleman's motion for a mental evaluation. C.P. 23. Three doctors, a psychiatrist and two psychologists, from the State Hospital conducted the mental evaluation. The examining doctors reviewed Coleman's police record, psychiatric records, and school records; reviewed information from the jail staff where Coleman was incarcerated; and interviewed defense counsel. Coleman was interviewed by the doctors for approximately two hours and also underwent an additional two hours of psychological testing. At the conclusion of the evaluation, the doctors reported the following opinion.

It is our opinion to a reasonable degree of psychological and psychiatric certainty that, at the time of our evaluation of him, Mr. Coleman had the sufficient present ability to consult with his attorney with a reasonable degree of rational understanding in the preparation of his defense, and that he had a rational as well as factual understanding of the nature and object of the legal proceedings against him.

Supplemental Exhibit.¹ The report also contained detailed factual findings to support the doctors'

¹The record was supplemented with the mental evaluation report per trial court order dated September 8, 2010. The supplemental exhibit containing the report is in the Mississippi Supreme Court Clerk's Office.

ultimate opinion that Coleman was competent to stand trial. In addition to finding that Coleman was “attempting to malingering symptoms of mental illness and cognitive deficits,” the examiners stated the following. Supp. Ex.

At the time of our evaluation of him, Mr. Coleman did not appear to demonstrate any significant impairment in his competence-related abilities. For example, he showed no deficits in his capacity to understand factual information about the charge against him, the seriousness of the offense with which he is currently charged, or the potential penalties associated with this offense. He spontaneously discussed the verdicts of Guilty and Not Guilty, and he understood the meanings and outcomes of each. Mr. Coleman appeared to understand the roles of the participants involved in a trial proceeds and had an adequate factual understanding of court process. He appeared to appreciate the adversarial nature of the proceedings against him and expressed no irrational concerns regarding whether or not he could receive a fair trial.

Mr. Coleman was able to identify his defense attorney by name, and he reported that he trusts his attorney and believes she is working to protect his best legal interests. Based on hypothetical scenarios, Mr. Coleman was able to make reasonable and rational legal decisions about plea bargaining and testifying without any significant impairment. He showed no difficulty understanding his constitutional rights and appropriately asserted his right not to incriminate himself at times during our interview of him. Although he was initially unfamiliar with several factual issues regarding court procedure (i.e., the number of jurors on a jury; who determines the verdict; the concept of a hung jury; what rights defendants waive when accepting a plea bargain), after these issues were explained to him, he had no difficulty understanding this.

Supp. Ex.

On the morning of trial, defense counsel appeared in court nearly an hour after trial was scheduled to begin and asked the court for a continuance. T. 5. Defense counsel asserted that Coleman was entitled to a competency hearing because he had undergone a court ordered mental evaluation, and that defense counsel needed time to subpoena witnesses for such a hearing. T. 6-7. The Court found that because defense counsel received the results of the mental evaluation ten days prior yet waited until the morning of trial after a jury had been qualified to ask for a hearing, the issue was waived. T. 11-12. Additionally, the trial court implicitly found that Coleman was

competent to stand trial. T. 10-11. The court noted that Coleman had been examined by three different doctors who, after conducting a two hour mental evaluation, reviewing Coleman's mental health records and school records, and interviewing Coleman's attorney and other acquaintances, gave an expert opinion that Coleman was competent to stand trial. T. 10-11. The trial court read the doctors' findings into the record. T. 11. The trial court denied the motion for continuance, and trial commenced shortly thereafter.

Defense counsel raised the issue of the competency hearing again on the second morning of trial in a motion for mistrial. C.P. 47; T. 189. The trial court again denied the motion. T. 189-90. Defense counsel again raised the issue in a motion for JNOV. At a hearing on the motion, the trial court again relied on the results of the mental evaluation in which three doctors found that Coleman was competent to stand trial. T. 346-47. The trial court then asked defense counsel what competing evidence she could have presented on the issue of Coleman's competence to stand trial. T. 347. In response, defense counsel cited Rule 9.06 and *Sanders v. State*, 9 So. 3d 1132 (Miss. 2009), to support her position that Coleman was entitled to a hearing because the Court ordered a mental evaluation. T. 343. However, at no time during the hearing did defense counsel specify what witnesses she could have called or what evidence she could have presented on the issue of Coleman's competence to stand trial. In denying the motion for JNOV, the trial court reiterated its finding that Coleman was competent to stand trial, citing both the results of the mental evaluation and the court's observation of Coleman during trial and on the witness stand. The trial court stated the following of its observations of Coleman during the trial.

[T]here was never any indication to this Court in any fashion that Patrick Coleman at any point during the trial, or at anytime, was not competent and capable, and certainly he had the ability to assist in his defense and participate with his attorney in the trial.

It was clearly the Court's observation that during the course of the trial, Mr. Coleman followed all directions, he assisted his attorney, and answered very cogently all questions both on direct, cross-examination, and redirect in the case.

T. 362-63. Accordingly, the trial court denied Coleman's motion for JNOV.

SUMMARY OF ARGUMENT

Although the trial court did not conduct a competency hearing after ordering a mental evaluation, the purpose of URCCCP Rule 9.06 was satisfied by the trial court's on-the-record determination that Coleman was competent to stand trial, where such decision was based on the mental evaluation report which is part of the record. Should this Court disagree and find reversal is warranted, the State would ask the Court to consider the alternate relief of reversing for a *nunc pro tunc* competency hearing. Although such a remedy has not been utilized in Mississippi, all federal courts and many state courts utilize *nunc pro tunc* competency hearings where appropriate.

Coleman's ineffective assistance of counsel claim is not supported by the record. Coleman fails to meet either *Strickland* prong with his allegations.

ARGUMENT

I. THE TRIAL COURT'S DENIAL OF COLEMAN'S MOTION FOR A CONTINUANCE TO SUBPOENA UNNAMED WITNESSES FOR A COMPETENCY HEARING ON THE MORNING OF TRIAL AFTER THE JURY VENIRE HAD BEEN SEATED IS NOT REVERSIBLE ERROR WHERE THE PURPOSE OF RULE 9.06 WAS SATISFIED.

A trial court's determination that a defendant is competent to stand trial will not be disturbed on appeal unless the finding is "manifestly against the overwhelming weight of the evidence." *Hearn v. State*, 3 So. 3d 722, 728 (¶14) (Miss. 2008) (quoting *Martin v. State*, 871 So.2d 693, 698 (Miss. 2004)). A defendant is competent to stand trial if he can understand the nature of the proceedings, communicate with his attorney about the case, recall relevant facts, testify in his own defense if he so chooses, and "satisfy the foregoing criteria [] commensurate with the severity of the case." *Id.* at (¶15). While Rule 9.06 of the Uniform Rules of County and Circuit Court Practice provides that if the trial court orders a mental evaluation it must subsequently conduct a competency hearing, Mississippi case law provides that in certain situations, the purpose of the Rule 9.06 can be satisfied without strict compliance.

Coleman relies on *Sanders v. State*, 9 So. 3d 1132 (Miss. 2009), to support his position that reversal is required because a competency hearing was not held after a mental evaluation was ordered.² *Sanders*, however, is distinguishable from the present case. In *Sanders*, the Mississippi Supreme Court reversed a murder conviction because after the trial court ordered a mental evaluation,

²The Appellant also confuses the issue of competency to stand trial and an insanity defense where he claims in his brief that the denial of the competency hearing prevented him from putting on an insanity defense. Appellant's Brief at 10. Clearly, the denial of the competency hearing had no bearing on Coleman's ability to present an insanity defense. Coleman was precluded from putting on an insanity defense because he failed to comply with Rule 9.07 of the Uniform Rules of County and Circuit Court procedure which provides that a written notice of insanity defense must be filed prior to trial. Defense counsel first alerted the trial court and the prosecuting attorney that she would proceed with an insanity defense on the second day of trial after the State rested. T. 188-89.

no competency hearing was held, the trial court made no on-the-record determination that Sanders was competent to stand trial, nor was there any evidence in the record to support a finding that Sanders was competent to stand trial. *Id.* at 1137, 1139 (¶17,25). First, the present case is distinguishable from *Sanders* because the trial court in the present case made a determination, based on the results of the mental evaluation, that Coleman was competent to stand trial. The present case is also distinguishable from *Sanders* because in the present case although there was no strict compliance with Rule 9.06, the purpose of the rule was satisfied by the trial court's reliance on the mental evaluation which is part of the record on appeal. The *Sanders* court made clear that strict compliance with Rule 9.06 is not necessary when the purpose of Rule 9.06 is satisfied. *Id.* at 1137 (¶¶19-20). For example, where a mental evaluation is ordered and no competency hearing is held, the purpose of Rule 9.06 is satisfied if at trial a qualified witness is examined regarding the defendant's competence to stand trial. *Id.* (citing *Hearn* at 730 (¶19)). The *Sanders* opinion also strongly suggests that where the trial court's finding that the defendant is competent to stand trial is based on the results of a mental evaluation which is made part of the record, the purpose of Rule 9.06 is met. The following language from *Sanders* supports this position.

The record lacks any testimony that relates to Sanders' competence to stand trial. The docket indicates that Dr. Webb did file a report with the trial court. However, the report was not entered into evidence and was not part of the record on appeal. Therefore, this Court is unable to review the report and Dr. Webb's opinion, if any, as to Sanders's competence to stand trial. One may argue or speculate that the appellate record before us today was sufficient to assume that Sanders was competent to stand trial. However, we reiterate the fact that the appellate record before us contains no evidence that Sanders was found to be competent to stand trial. At a minimum, there was no definitive testimony or report that determined Sanders competent to stand trial.

Id. at 1139 (¶25).

The Mississippi Supreme Court again suggested in *Jay v. State*, 25 So. 3d 257 (Miss. 2010),

the only post-*Sanders* case thus far that has considered the issue at hand, that where a report of the defendant's mental evaluation which states that a defendant is competent to stand trial is relied on by the trial court and made part of the record, the purpose of Rule 9.06 is met. In *Jay*, the defendant sustained a traumatic brain injury while awaiting trial. *Id.* at 258 (¶5). One week before trial, defense counsel filed a motion for continuance, claiming that Jay was not competent to stand trial due to the injury. *Id.* at (¶6). Attached to the motion was a letter from a doctor, the Director of the Brain Injury Program at Methodist Rehabilitation Center, who opined that Jay was “‘unable to participate in any court proceedings at this time’ due to his injuries.” *Id.* The trial court then ordered a court appointed psychiatrist to conduct a psychiatric evaluation of Jay to determine whether he was competent to stand trial. *Id.* at (¶7). No competency hearing was held, and the psychiatrist's report was not filed with the court until two days after the trial commenced. *Id.* at (¶8). As it turns out, the result of the report was that the examining psychiatrist found that Jay was competent to stand trial. *Id.* at 259 (¶8). Because there was neither strict compliance with Rule 9.06 nor had the purpose of the rule been met, Jay's conviction was reversed and the case was remanded for a new trial subject to a determination of whether Jay was competent to stand trial. *Id.* at 263, 264 (¶¶34-35, 40). However, the *Jay* court stated the following which suggests that the purpose of Rule 9.06 would have been met had there been evidence in the record that the trial court found Jay competent to stand trial based on a review of the psychiatrist's report.

There is no indication in the record that the trial judge ever read or considered [the report]. Dr. Webb's report concluded that Jay was 'competent to stand trial.' Thus, the court file contained conflicting opinions as to whether Jay was competent to stand trial. We have no way of knowing whether the trial judge considered the two opinions and found Dr. Webb's opinion more persuasive, or simply failed to hold a hearing to consider the matter.

Id. at 262 (¶27).

Both *Sanders* and *Jay* explicitly acknowledge that where a mental evaluation is ordered, but no subsequent competency hearing is held prior to trial, reversal is not required where “the purposes of Rule 9.06 were satisfied.” *Sanders* at 1137 (¶20); *Jay* at 263 (¶34). So far, the only example we have of what satisfies the purpose of Rule 9.06 other than a competency hearing is where the psychiatrist who conducted the mental evaluation testifies at trial regarding the defendant’s competence to stand trial. *Id.* (both citing *Hearn v. State*, 3 So. 3d 722 (Miss. 2008)). However, both *Sanders* and *Jay* suggest that a trial court’s determination that a defendant is competent to stand trial which is based on the mental evaluation report which is made part of the record satisfies the purpose of Rule 9.06. Because the trial court’s determination that Coleman was competent to stand trial was based on the mental evaluation report which is in the record, the State submits that the purpose of Rule 9.06 has been satisfied.

However, should this honorable Court find that the purpose of Rule 9.06 was not satisfied, the State would ask the Court to remand for a *nunc pro tunc* competency hearing rather than reverse and remand for a new trial. Although such a procedure has not yet been utilized in Mississippi cases, all federal courts and many states allow *nunc pro tunc* competency hearings on remand. See *Edwards v. State*, 902 N.E. 2d. 821, 826 fn3 (Ind. 2009) (listing cases from the First through Eleventh Circuits which allowed the district courts on remand to conduct *nunc pro tunc* competency hearings where appropriate.).³ In recognizing that retrospective competency hearings are not always a viable option, the Fifth Circuit has “repeatedly sanctioned *nunc pro tunc* proceedings where there is sufficient data available to guarantee reliability.” *Wheat v. Thigpen*, 793 F.2d 621, 630 (5th Cir.1986) (quoting *United States v. Makris*, 535 F.2d 899, 904 (5th Cir.1976)). Some factors that courts consider in

³Although not mentioned in *Edwards*, the D.C. Circuit also allows for *nunc pro tunc* competency hearings. *Heard v. U.S.*, 390 F.2d 866, 868-869 (DC Cir. 1968).

determining whether a meaningful *nunc pro tunc* competency hearing can be held are:

(1) the passage of time, (2) the availability of contemporaneous medical evidence, including medical records and prior competency determinations, (3) any statements by the defendant in the trial record, and (4) the availability of individuals and trial witnesses, both experts and non-experts, who were in a position to interact with defendant before and during trial, including the trial judge, counsel for both the government and defendant, and jail officials.

Edwards, 902 N.E. 2d at 826. See also *State v. Juniors*, 918 So.2d 1137, 1145, (La. Ct. App. 2005); *Caballero v. State*, 587 S.W.2d 741, 743 (Tex. Cr. App. 1979); *Wheat*, 793 F.3d at 630.. Additionally, “Mental examinations conducted close to the trial date, of course, increase the probability that the *nunc pro tunc* hearing will not be unduly speculative.” *U.S. v. Makris*, 535 F.2d 899, 904-05 (5th Cir. 1976) (citing *Holloway v. United States*, 343 F.2d 265 (D.C. Cir. 1964)).

In the present case, only one year and three months have passed since Coleman’s trial. Coleman’s mental evaluation was conducted just two months prior to trial.⁴ During the mental evaluation, the examining psychiatrist and psychologists reviewed Coleman’s medical, school, and criminal records and statements from Coleman’s defense attorney and other acquaintances. All of this information would still be available for consideration at a *nunc pro tunc* competency hearing. The doctors who conducted the evaluation and the individuals who gave statements regarding Coleman’s competency could testify. Coleman could put on defense counsel and any friends and family with whom he interacted prior to and during trial. Coleman’s own trial testimony and pretrial statements could be examined. A retrospective competency hearing is a viable option in the present case because there is sufficient evidence of Coleman’s mental state at the time of trial on which to base a subsequent competency determination. Accordingly, should the Court find that reversal is

⁴Coleman’s trial commenced on June 1, 2009, and the report from the mental evaluation shows that Coleman was examined on April 1, 2009.

required, the State asks the Court to consider this alternative relief.

II. COLEMAN DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

Although this Court is not prohibited from considering claims of ineffective assistance of counsel on direct appeal, Coleman's claim of ineffective assistance should be brought in a post-conviction relief proceeding where he will have the benefit of affidavits to support his claim. Appellate courts considering ineffective assistance of counsel claims on direct appeal are limited to "the four corners of the record." *McGregory v. State*, 979 So.2d 12, 21 (¶29) (Miss. Ct. App. 2008). As it stands, the record does not show ineffective assistance of constitutional proportions, and the State will not stipulate that the record is adequate to support Coleman's claim. *Fannings v. State*, 997 So.2d 953, 965 (¶37) (Miss. Ct. App. 2008). The very fact that Coleman has improperly attached an affidavit to his brief in an attempt to support his claim of ineffective assistance shows that his claim cannot be decided on the record. Because the bulk of Coleman's allegations of ineffective assistance involve alleged inaction by defense counsel, Coleman's claim should be presented in a motion for post-conviction relief where he will have the benefit of affidavits to attempt to support his claim. *Robinson v. State*, 25 So.3d 1084, 1086 (¶12) (Miss. Ct. App. 2010).

Should the Court address Coleman's claim of ineffective assistance on direct appeal, the State would offer the following to show that the record does not support a finding that defense counsel rendered constitutionally deficient performance. Coleman complains that defense counsel's failure to do the following constitutes ineffective assistance: have the trial court grant instructions on self-defense and manslaughter, present a defense, and file a motion to suppress his confession. To succeed on his claim of ineffective assistance, Coleman carries the very high burden of demonstrating that defense counsel's performance was deficient, and the deficient performance prejudiced the outcome of the trial. *Leatherwood v. State*, 473 So.2d 964, 968-69 (Miss. 1985))

(citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

The trial court refused Coleman's self-defense and manslaughter instructions as having no evidentiary foundation. T. 290, 297. That there is no record support for the granting of an instruction can in no way be deficient performance. Defense counsel can only work with the available facts. The record paints only one picture: Coleman shot an unarmed man to death because the victim may have exchanged words with Coleman's wife earlier that morning. Coleman was not entitled to either a self-defense or manslaughter instruction because there was no evidentiary foundation for either, not because defense counsel rendered constitutionally deficient performance.

Coleman claims that defense counsel presented no defense. However, it is clear from closing argument that the defense was that the State failed to prove deliberate design. T. 316, 317, 318, 322. That defense counsel could not create another defense from whole cloth does not render her assistance constitutionally defective.

Coleman also alleges that it was ineffective for defense counsel to not file a motion to suppress his confession. However, counsel's decision on whether or not to file certain motions "falls within the ambit of trial strategy," and cannot give rise to a claim of ineffective assistance of counsel. *Scott v. State*, 742 So.2d 1190, 1196 (¶14) (Miss. Ct. App. 1999). Further, Coleman fails to even suggest an argument for exclusion of his confession, and there is no basis in the record for exclusion of the confession.

Finally, Coleman references the fact that he initially informed the trial court after the State rested that he would not testify, but later changed his mind. How this is relevant to his claim of ineffective assistance is unclear. Coleman exercised his right to testify on his own behalf after being twice informed by the court that it was his decision to make. T. 196, 216. Twice, Coleman stated on the record that he had consulted with defense counsel regarding whether or not he should testify.

T. 196, 216. Defense counsel informed the court that she had explained the pros and cons of testifying to Coleman. T. 216. Coleman fails to show how his decision to testify on his own behalf constitutes deficient performance.

Coleman fails to meet either *Strickland* prong in his claim of ineffective assistance of counsel. Accordingly, his second issue necessarily fails.

CERTIFICATE OF SERVICE

I, La Donna C. Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 22nd day of September, 2010.



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