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Summary of Fergusen v. State, 124 Nev. Adv. Op. No. 69

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***Ferguson v. State*, 124 Nev. Adv. Op. No. 69 (Sept. 11, 2008)¹**

CRIMINAL LAW – COMPETENCY TO STAND TRIAL

Summary

Appeal from a judgment of conviction, upon jury verdict, of one count each of burglary, sexual assault, robbery, and first-degree kidnapping.

Disposition/ Outcome

Reversed the judgment of conviction and remanded this matter for a new trial, so long as Ferguson is found to be competent to stand trial.

Factual and procedural History

In 2003, Ferguson was charged with burglary, sexual assault, robbery, and first-degree kidnapping.² In 2005, Ferguson’s defense counsel filed a motion to declare Nevada’s competency standard unconstitutional. At the hearing, defense counsel stated that two psychologists had deemed Ferguson incompetent to stand trial. In response, the district court ordered Ferguson be sent to Lake’s Crossing Center for a competency determination.³

In 2005, the Eighth Judicial District Court assigned the determination of all competency matters to Eighth Judicial District Court Judge Jackie Glass (Department 5). Thus, when Ferguson returned from Lake’s Crossing, Department 5 handled the proceedings related to his competency. Ferguson’s defense counsel was unable to be present at these court proceedings. The deputy public defender who was “covering” for Ferguson’s defense attorney asked for a continuance. The court denied this request and went ahead with the competence hearing. At the hearing, the district court received a report which stated that three doctors at Lake’s Crossing had deemed Ferguson competent to stand trial. Based on this, Department 5 determined Ferguson to be competent and ordered the case to proceed to trial. Ferguson’s trial was assigned to Eighth Judicial District Court Judge Stewart L. Bell (Department 7).

During a status check hearing in Department 7, defense counsel informed the district court that, prior to Ferguson being sent to Lake’s Crossing, they had planned on presenting evidence that Ferguson could never be deemed competent to stand trial. Also, defense counsel informed the district court that they had not received the Lake’s Crossing report relied on during the Department 5 competency hearing.⁴ The trial court informed defense counsel that they could

¹ By Tara Zimmerman

² After he was bound over to district court for trial, many continuances relating to Ferguson’s competency were granted throughout 2004 and 2005.

³ Lake’s Crossing Center is a mental health facility operated by the Division of Mental Health and Developmental Services of the Department of Health and Human Services (Division).

⁴ Nearly two months after this status check, defense counsel informed Department 5 that they still had not received the report from Lake’s Crossing. However, at a later hearing, defense counsel informed the court that their office had received the report sometime earlier and that it apparently was not transferred to the deputy public defender assigned to Ferguson’s case.

file a motion arguing that Ferguson could never be deemed competent, but, it would be considered by Department 5. Nearly two months later, defense counsel filed a motion for a hearing as to competency challenging the report made by the Lake's Crossing treatment team.

The hearing was conducted in Department 5. At the hearing, the State objected to the motion as untimely.⁵ After hearing arguments, Department 5 decided it would grant defense counsel's motion for a hearing as to competency prior to Ferguson's trial date set by Department 7.^{6,7} Subsequently, however, Department 5 notified the parties that it had reconsidered its decision and was no longer going to grant the motion.⁸ At the subsequent hearing, Department 5 found that Ferguson was competent to stand trial and thus, a hearing as to competency was not warranted. The court based its decision on its review of the Lake's Crossing report and reports from the detention center. They further stated that despite defense counsel's assertion that Ferguson was unable to aid and assist in his defense, Ferguson did not meet the standard for incompetency under Dusky v. United States.⁹ Defense counsel objecting to Department 5's findings and filed an offer of proof and affidavit under seal with respect to what defense counsel would have shown if there had been a hearing as to competency.

Ferguson's case was consequently, transferred back to Department 7. Defense counsel filed another motion for a competency hearing.¹⁰ Department 7 held a hearing on the new motion. At the hearing, Department 7 denied defense counsel's motion because Department 5 had previously found defense counsel's arguments to be without merit and Ferguson to be competent to stand trial. Defense counsel subsequently filed a writ petition with the Supreme Court of Nevada, which was ultimately denied.¹¹

Shortly before trial, defense counsel orally informed Department 7 that they were having Ferguson see some psychologists who would possibly deem him incompetent to stand trial. Department 5 informed the parties that it would not consider evidence relating to competency from doctors who were not appointed by Department 5. Further, despite defense counsel's reiteration that Ferguson was not communicating with counsel, the district court ordered that trial would proceed as scheduled.

On the first day of trial, defense counsel filed a motion to strike all the rulings made by Department 5 and to compel a *de novo* hearing as to Ferguson's competency. Defense counsel argued that the district court should have stricken Department 5's rulings because Department 5 had attempted to file an amicus curiae brief in the defense's writ petition, therefore, Department

⁵ The state also argued that it had been informed by the detention center that Ferguson had been requesting documents to aid in his defense and was hoarding his medications in order to sell them. This, they argue is evidence of his competency. Additionally, the state argued that defense counsel had not presented any new reports and were incorrectly basing their challenge on evaluations that occurred prior to Ferguson's evaluation at Lake's Crossing.

⁶ The Court reasoned that because it had considered untimely motions in other cases, it would do so here as well.

⁷ Additionally, Department 5 offered to provide a subpoena or court order allowing defense counsel to obtain Ferguson's "day-to-day treatment" reports from Lake's Crossing.

⁸ The Judge held a chambers conference, in which the court apparently asked defense counsel to provide additional reasons to justify a competency hearing. Defense counsel argued that Ferguson was incompetent because he did not have the present ability to aid and assist defense counsel. Five days later, Department 5 held a hearing to make a record of what had taken place during the chambers conference.

⁹ 363 U.S. 402 (1960)

¹⁰ Defense counsel made the same arguments as they had in the previous motion considered by Department 5, and additionally argued that counsel had to file their first motion without the benefit of the Lake's Crossing report and that no formal findings of competency had been made by the district court.

¹¹ Ferguson v. Dist Ct., Docket No. 47159 (Order Denying Petition, July 27, 2006)

5 had manifested bias and prejudice. Further, defense counsel maintained that Ferguson was still not able to consult with defense counsel. The district court allowed defense counsel to file their motion to strike, but did not consider it. Defense counsel thereafter requested a stay and filed another writ petition seeking the Supreme Court's intervention, which was denied

Ferguson was found guilty of all charges at the jury trial. At sentencing, defense counsel requested a continuance because they were unable to review the parole and probation report with Ferguson. Defense counsel also asked the district court for additional time to allow Ferguson to undergo a psychiatric evaluation and further asserted that Ferguson needed to be sent back to Lake's Crossing pursuant to Nevada's competency statutes. The district court disagreed.¹² Consequently, the district court sentenced Ferguson, and this appeal followed.

Discussion

Determination of all competency issues by Department 5

Ferguson argued that Nevada law does not authorize the Eighth Judicial District Court to delegate the adjudication of all competency matters to Department 5. Specifically, Ferguson contended that EDCR 1.33 does not specifically provide for the assignment of all competency matters to a particular district court judge. The Court determined that under EDCR 1.30(b)(5), 1.60(a), and 3.10(b), the chief judge of the Eighth Judicial District has the discretion to assign the determination of all competency matters to Department 5. And, while EDCR 1.33 does not explicitly provide for a specialized competency court division, it does not limit the chief judge's authority under EDCR 1.30(b)(5), 1.60(a), and 3.10(b).

Next, the court concluded that the determination of a defendant's ongoing competency during trial must vest with the trial judge assigned to adjudicate the matter. In reaching this conclusion, the court adhered to the holding of the United States Supreme Court decision, Drope v. Missouri.¹³ Thus, the court concluded that any assignment of a competency determination to a different competency judge during trial would violate Drope v. Missouri because "a trial judge is the only adjudicator who can, among other things, assess firsthand a defendant's present ability to consult with his or her lawyer and determine whether a defendant's present behavior and demeanor during trial demonstrate that he or she is not competent to stand trial."¹⁴

The right to a hearing as to competency

Ferguson argued that the district court erred by not affording him a hearing to challenge the report as to competency under NRS 178.455 and NRS 178.460 after he returned from Lake's Crossing.¹⁵ Further, Ferguson argued that this refusal violated his due process rights to a hearing constitutionally guaranteed under Pate v. Robinson.¹⁶ Ferguson additionally argued that he

¹² The court noted that Ferguson had engaged in conversations with the district court every day while waiting for defense counsel's arrival in the courtroom and based on its daily conversations with Ferguson, the district court determined that defense counsel's request to send Ferguson back to Lake's Crossing was not warranted.

¹³ 420 U.S. 162, 181 (1975) (stating that while a defendant may be competent at the commencement of trial, the trial court must always be alert to circumstances suggesting a change that would render the defendant incompetent to stand trial). The court recognized that "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial" are relevant factors in assessing competency. *Id.* at 180.

¹⁴ Ferguson v. State, 124 Nev. Adv. Op. No. 69 (Sept. 11, 2008) (emphasis in original).

¹⁵ Under NRS 178.460, Ferguson would be allowed to examine and contest the report prepared by Lake's Crossing,

¹⁶ 383 U.S. 375 (1966)

should have been afforded a hearing because his counsel had raised competency concerns as to his ability to aid and assist counsel at that time. Finally, Ferguson argued that because his counsel was not present at the proceeding that had taken place upon his return from Lake's Crossing, that proceeding was a "sham."

In response, the State argued that Ferguson's request for a hearing under NRS 178.460 was untimely. Additionally, the State argued that a hearing as to competency was not required because, under Morales v. State,¹⁷ a hearing as to competency is only required when there is reasonable doubt as to the defendant's competency. The State argued that defense counsel failed to present evidence that amounted to reasonable doubt because all the evidence relied upon in defense counsel's motion for a competency hearing was supported by medical findings that were made prior to Ferguson's commitment to Lake's Crossing. Thus, the State contended that a hearing as to competency was not warranted.

In Morales, the Supreme Court reiterated its holding in Melchor-Gloria v. State,¹⁸ and stated that "[w]here there is reasonable doubt regarding a defendant's competency, a district court's failure to order a competency evaluation constitutes an abuse of discretion and a denial of due process."¹⁹ Further, under Nevada law, a district court is required to suspend proceedings against a defendant at any time during the proceedings, "if doubt arises as to the competence of the defendant."²⁰ When a defendant is deemed incompetent and sent to a facility for a competency evaluation, the Administrator of the Division is required to submit a report.²¹ NRS 178.460 provides that "the judge shall hold a hearing" concerning the Administrator's report if such a hearing is requested within 10 days of receiving the report.²² Thus, upon a timely request, the district court must afford a defendant a hearing after his return from a mental health facility to allow counsel to examine and contest the report prepared by the treatment team.

The court concluded that the district court abused its discretion in denying Ferguson's request for a continuance at the hearing after his return from Lake's Crossing. The court reasoned that while Ferguson did have an attorney present with him, the deputy public defender present was not his attorney. As such, the court held that Ferguson had not been afforded a meaningful opportunity to confer with his counsel prior to the hearing. Thus, the court concluded that Ferguson was denied a meaningful opportunity to be heard and was denied the meaningful opportunity to challenge the findings made in the Lake's Crossing report.²³

The court further concluded that Department 5 abused its discretion in not granting a hearing as to competency upon defense counsel's motion. The court noted that the motion may have been untimely under NRS 178.460, however, a competency hearing was warranted because defense counsel had presented evidence that raised sufficient reasonable doubt as to Ferguson's competency to stand trial. As such, the court ultimately concluded that Department 5 should

¹⁷ 116 Nev. 19, 992 P.2d 252 (2000)

¹⁸ 99 Nev. 174, 660 P.2d 252 (2000),

¹⁹ 116 Nev. at 22, 992 P.2d at 254 (citing Ford v. State, 102 Nev. 126, 133, 717 P.2d 27, 31-32 (1986) and Melchor-Gloria, 99 Nev. at 180, 660 P.2d at 113); see also Pate, 383 U.S. at 385.

²⁰ NRS 178.405(1).

²¹ NRS 178.455(1).

²² The Court also noted that evidence received at every stage of the competency proceedings may be relevant to the defendant's competency and should be considered at such a competency hearing. Calvin v. State 122 Nev. 1178, 1183, 147 P.3d 1097, 1100 (2006).

²³ See Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard.").

have afforded defense counsel the opportunity to present their evidence relating to Ferguson's competency during a hearing.

CHERRY, J., concurring in part and dissenting in part:

Justice Cherry concurred that appellant's judgment of conviction should be reversed and his case remanded for a new trial, if he is deemed competent. He also agreed with the majority that the determination of a defendant's ongoing competency during trial must vest with the trial judge who has been assigned to hear the matter. He also reluctantly agreed with the majority that the Eighth Judicial District Court has the discretion to assign the determination of all *initial* competency matters to Department 5 (emphasis added). However, because the trial judge needs to continuously manage the ongoing criminal prosecution, it is Justice Cherry's opinion that once a defendant has been committed to a mental health facility such as Lake's Crossing, and is returned to the district court upon being found competent to stand trial, the appropriate member of the judiciary to determine competency is the trial judge rather than Department 5.

Conclusion

The court concluded that the Eighth Judicial District has the discretion to assign the determination of all competency matters to Department 5. However, the determination of a defendant's ongoing competency during trial must vest with the trial judge who has been assigned to adjudicate the matter. They further concluded that the district court abused its discretion in denying Ferguson's request for a continuance upon his return from Lake's Crossing. And, the district court's refusal to grant Ferguson a hearing as to competency upon his return from Lake's Crossing violated his right to a fair trial. Accordingly, the court reversed the judgment of conviction and remanded this matter for a new trial, so long as Ferguson is found to be competent to stand trial.²⁴

²⁴ The court further concluded that Department 7 should have granted Ferguson a competency hearing when defense counsel filed their motion to strike all the rulings made by Department 5 and to compel a de novo hearing as to Ferguson's competency. Upon reviewing the evidence, the court found that by supporting their motion by evaluations that had taken place after Ferguson's commitment to Lake's Crossing, defense counsel had sufficiently raised doubt as to Ferguson's competency. Thus, in light of the new evidence presented by defense counsel, the court concluded that Department 7 erred in yielding to Department 5's competency determination. Likewise, they concluded that Department 7's view that Department 5 would not consider any evidence relating to competency from any doctors who are not appointed by the district court violated the holding in Calvin, 122 Nev. at 1183, 147 P.3d at 1100.