

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
IN THE MIDDLE DIVISION AT NASHVILLE**

STATE OF TENNESSEE) Circuit Court for Williamson County
) Case No. S83428
Appellee,)
v.)
)
RICHARD C. TAYLOR) C.C.A. No. M2005-01941-CCA-R3-DD
)
Appellant.) CAPITAL CASE
)

BRIEF OF APPELLANT RICHARD C. TAYLOR

ORAL ARGUMENT REQUESTED

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ARGUMENT

1. JUDGE HELDMAN VIOLATED TAYLOR'S RIGHTS UNDER THE UNITED STATES AND TENNESSEE CONSTITUTIONS BY HOLDING A NON-ADVERSARIAL COMPETENCY HEARING WITHOUT COUNSEL

**This argument, the first assigned error in the direct appeal brief filed in Richard Taylor's case, is an excerpt from the full brief.*

A. INTRODUCTION

"Competency to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." Cooper v. Oklahoma, 517 U.S. 348, 354 (1996) (citations omitted). Even though Richard Taylor had been adjudicated incompetent to stand trial for years before more recently being found competent and even though the state's own physician described his competency as waxing and waning (Vol. 34, 66), Judge Heldman held a pre-trial competency hearing where Taylor was unrepresented by counsel and where both he and the state both took the same position – that Taylor was competent to stand trial. This non-adversarial hearing, lacking in the basic constitutional protections required by the Sixth, Eighth, Fourteenth Amendments of the United States Constitution and Article I, Sections 8,9, and 16 of the Tennessee Constitution, was a gross abuse of justice. Judge Heldman's failure to hold a constitutionally adequate hearing on Taylor's competency was raised in the motion for new trial. (Vol. 12, 1718, 1723-1730).

B. RELEVANT FACTS

In the years from 1997 to 2003, the trial court held four hearings on Taylor's competency. At the first hearing in 1997, in the state post-conviction case, the state and its court-appointed expert contended that Taylor was competent despite his serious mental illness. (Vol. 2, 152).

After eleven days of testimony, the trial court, Judge William S. Russell, found otherwise. (Vol. 2, 115). Judge Russell concluded that Taylor was then incompetent to stand trial, was likely insane at the time of the trial, and was incompetent to be executed under the standard enunciated in Ford v. Wainwright, 477 U.S. 399 (1986).

The next competency hearing was held in 2000 in front of a new judge, Judge Donald Harris. Physicians from MTMHI testified that Taylor was psychotic, schizophrenic, and incompetent to stand trial, and Judge Harris found him incompetent to stand trial. (Vol. 5, 542; Vol. 30, 9, 21, 29, 38). In the spring of 2003, a third trial judge, Judge Russ Heldman, held another competency hearing. (Vol. 34-35). At this hearing, a psychiatrist and psychologist from MTMHI testified to their belief that Taylor, although schizophrenic, was competent at that time. (Vol. 34, 14, 26, 92). The psychologist testified that Taylor's competency might vary over time and warned that Taylor could decompensate at trial if he represented himself. (Vol. 34, 66, 80). Six lay witnesses and an independent psychiatrist appointed by the Court to assist the defense testified that Taylor remained incompetent. (Vol. 35, 42, 115, 135, 151, 218). Judge Heldman determined that Taylor was competent to stand trial and scheduled a trial date. (Vol. 7, 854). Shortly after concluding that Taylor was competent to stand trial, Judge Heldman found that Taylor was competent to represent himself. (Vol. 9, 1206).

In 2003, Taylor's previously appointed counsel filed a pleading raising his competency and the constitutionality of his forced medication. (Vol. 9, 1215). On October 14, 2003, the first day of trial, Judge Heldman held a hearing on this motion, addressing "whether Defendant is still competent to stand trial... and (2) whether the criteria set forth in the Sell case are still met." (Vol. 9, 1268) (referring to Sell v. United States, 539 U.S. 166, 177 (2003)). Unlike the first three competency hearings, however, Taylor was not represented by counsel because Judge

Heldman ruled that the counsel did not have standing to raise any issues related to Taylor's mental health (Vol. 9, 1268) and that any participation by counsel – even "elbow counsel" – would be unconstitutional and could not be permitted. (Vol. 9, 1268).

In the order setting the hearing, Judge Heldman directed that the "State shall have its expert witnesses, Drs. Ron Stout and Rokeya Farooque, present affirmatively" to address Taylor's competency and the forcible medication issue. (Vol. 9, 1268). Judge Heldman did not order or even suggest that it would be permissible to have present Dr. Caruso, or any of the lay witnesses who testified at the earlier 2003 hearing. (Vol. 9, 1268). Furthermore, Judge Heldman prohibited Taylor's conservator and former guardian from participating. (Vol. 17, 35; Vol. 11, 1512-1513). He issued an order striking written reports the conservator and former guardian had filed with the court in relation to the hearing.

At this full-blown (albeit non-adversarial) competency hearing, Dr. Stout and Dr. Farooque testified that Taylor was competent to stand trial. Neither one of them was cross-examined and no contrary evidence was presented. (Vol. 17, 20-21, 52, 56, 57). Dr. Stout testified Taylor had given recently an evasive answer in response to a question whether he believed that he had previously died. See Vol. 17, 50 (stating that when questioned whether he had "any notions that he has died before, Taylor's response was vague ... he said this was an [] experience he had [] in the past but was unsure if he believes this now.") Six months earlier, at the April, 2003 competency hearing, Dr. Stout had testified that "when asked, [Taylor] denied believing anymore that he had died and come back to life" and that this was a "marker of improvement" of Taylor's mental condition. (Vol. 34, 23).

Dr. Farooque testified at the October competency hearing that she was no longer prescribing medication to Taylor because he had been discharged to the Department of

Corrections and was now under the treatment of another physician. (Vol. 17, 10, 15). Edward Ryan, Taylor's conservator, attempted to inform the court at the hearing that Taylor's current medications at TDOC had been recently reduced by Dr. Casey Arney, Taylor's treating physician at TDOC. (Vol. 17, 34).

Judge Heldman refused to permit Mr. Ryan to testify or participate. (Vol. 17, 35). Dr. Arney, whom Judge Heldman had not ordered to be present, was not at the hearing and did not testify about Taylor's medications at trial. Instead, Dr. Farooque left the hearing, called someone from Dr. Arney's department, and testified that Taylor's medications had been tapered off the day before the hearing. (Vol. 17, 37, 53-54). Dr. Farooque further testified that she was not able to learn the doses or medications Taylor was currently taking. (Vol. 17, 53-54).

After the unchallenged testimony of Drs. Stout and Farooque – and in the absence of testimony by any defense witnesses -- Judge Heldman ruled that Taylor was competent to stand trial, issued an order that the "instruction concerning a tapering off (of Taylor's medications) is now countermanded," and then proceeded immediately to voir dire in Taylor's capital murder trial. (Vol. 17, 61, 65; Vol. 11, 1499).

C. JUDGE HELDMAN ERRED BY FAILING TO PERMIT COUNSEL TO REPRESENT TAYLOR AT THE COMPETENCY HEARING

"It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." Medina v. California, 505 U.S. 437, 439 (1992) (citations omitted). This fundamental tenet demands that a trial court hold a competency hearing whenever the evidence raises a "sufficient doubt" about a defendant's competency. Drope v. Missouri, 420 U.S. 162, 180 (1975).

A defendant has a right to counsel at a competency hearing. Appel v. Horn, 250 F.3d 203, 215 (3d Cir. 2001); United States v. Klat, 156 F.3d 1258, 1262 (D.C. Cir. 1998); United States v.

Barfield, 969 F.2d 1554, 1556 (4th Cir. 1992); Sturgis v. Goldsmith, 796 F.2d 1103, 1109 (9th Cir. 1986); United States v. Collins II, 430 F.3d 1260, 1264 (10th Cir. 2005) (agreeing with other federal circuits and holding that a competency hearing is a critical stage). A defendant must be competent to waive counsel and the waiver must be knowing, voluntary, and intelligent. See Godinez v. Moran, 509 U.S. 389, 400-401, n.12 (1993).

A defendant whose competency is in sufficient doubt to require a competency hearing cannot competently, knowingly, voluntarily, and intelligently waive his right to counsel at the hearing. As the Second Circuit has explained, "[I]logically, the trial court cannot simultaneously question a defendant's mental competence to stand trial and at one and the same time be convinced that the defendant has knowingly and intelligently waived his right to counsel." United States v. Purnett, 910 F.2d 51, 55 (2d Cir. 1990). Other courts have reached the same conclusion. See United States v. Klat, 156 F.3d 1258, 1263 (D.C. Cir. 1998) ("[W]e find it contradictory to conclude that a defendant whose competency is reasonably in question could nevertheless knowingly and intelligently waive her Sixth Amendment right to counsel."); United States v. Boigegrain, 155 F.3d 1181, 1186 (10th Cir. 1998) ("it was impossible for the district court to allow the defendant to waive counsel before determining whether he was competent to stand trial [because] [b]efore resolving the first question the court had to resolve the second." (citing Godinez, 509 U.S. at 399-400)); United States ex rel. Konigsberg v. Vincent, 388 F. Supp. 221, 225 (S.D.N.Y. 1975) ("Where a defendant's competency has been put in issue, the trial judge must first determine that the defendant is capable of making an intelligent and understanding waiver before deciding whether such a waiver has been made."). Cf. Pate v. Robinson, 383 U.S. 375, 384 (1966) ("it is contradictory to argue that a defendant may be incompetent and yet knowingly or intelligently 'waive' his right[s]").

In this case, Judge Heldman had a substantial basis for concern about Taylor's competency: Taylor was severely mentally ill and schizophrenic (Vol. 34, 14, 92, Vol. 35, 181-182, 268); he had been adjudicated incompetent in two of the last three competency hearings (Vol. 2, 115, Vol. 5, 542); all of his former counsel had unanimously testified that he could not form a meaningful relationship with counsel (Vol. 35, 23-24, 115, 132, 153); his former appointed counsel had filed a motion raising the issue of his competency (Vol. 9, 1215); and one of the only two witnesses who testified at the previous hearing that Taylor was competent had warned that Taylor's competency was variable and that he might decompose under the stress of a capital trial. (Vol. 34, 66, 80).

Given this substantial basis, the Sixth and Fourteenth Amendments and Article I, Sections 8 and 9 of the Tennessee Constitution required Judge Heldman to appoint counsel to represent Taylor at the full-blown competency hearing that occurred in October 2003. Like the defendant in United States v. Klat, Taylor "was erroneously denied [his] Sixth Amendment right to counsel because the [trial] court found reasonable cause to doubt appellant's competency to stand trial and yet failed to appoint counsel to represent [him] through the resolution of the competency issue." Klat, 156 F.3d at 1263.

In United States v. Zedner, 193 F.3d 562 (2d Cir. 1999) (*per curiam*), the trial court had found that the defendant knowingly and intelligently waived counsel thirteen months before trial. Id. at 566. The trial court later held a *sua sponte* competency hearing on the eve of trial where the defendant represented himself. Id. The Second Circuit reversed, concluding that it was error for the court "to have allowed defendant to appear *pro se* at his own competency hearing." Id.¹

¹ This full-blown evidentiary hearing on Richard Taylor's competency – in which the court *sua sponte* ordered the attendance of state expert witnesses -- was most definitely not a "precautionary hearing" in which the court "did not harbor serious doubts about [the defendant's]

Similarly, in Wise v. Bowersox, 136 F.3d 1197 (8th Cir. 1998), the Eighth Circuit upheld a second competency hearing where the defendant was without appointed counsel *only because* the defendant was represented by standby counsel at the hearing and "the contrary point of view was well represented." 136 F.3d at 1203. But see, Burks v. State, 748 P.2d 1178, 1181 (Alaska Ct. App. 1998) ("appointment of standby counsel is not a substitute for appointed counsel where a person is incapable of making a constitutional waiver of counsel"). In sharp contrast to Wise, here no standby counsel was present or permitted to participate and there was no adversarial presentation of a contrary point of view. Indeed, undersigned counsel have located no case in the country that has upheld a pre-trial competency hearing held where the defendant's competency was seriously at issue and where the defendant was not represented by counsel or assisted by standby counsel who actively challenged his competency.²

"[T]he Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceedings." United States v Cronin, 466 U.S. 648, 659, n. 25 (1984) (citations omitted). Accordingly, the appropriate remedy for denial of counsel at a competency hearing is

competency." United States v. Nichols, 56 F.3d 403, 414 (2nd Cir. 1995); See also, United States v. Morrison, 153 F.3d 34, 47 (2d Cir. 1998) (distinguishing rule that a trial court "must appoint counsel to serve until the issue with respect to competency is resolved" from cases where court holds subsequent "precautionary measure" hearings). Therefore, the fact that Judge Heldman had found Taylor competent seven months before is entirely irrelevant to whether Taylor's right to self-representation had to yield to his right to counsel and his right to be competent to stand trial at the October competency hearing.

² Like the Wise court, other courts have analyzed the role played by standby counsel when evaluating whether standby counsel provided sufficient representation at a competency hearing. See United States v. Leggett, 1994 WL 171441, at *2 (6th Cir. May 5, 1994) (upholding competency hearing where standby counsel was appointed and participated in competency hearing); United States v. Zedner, 193 F.3d 562 (2d. Cir. 1999) (*per curiam*)(finding that "the presence of advisory counsel at defendant's competency hearing did not provide defendant with representation sufficient to satisfy his Sixth Amendment right to counsel" where standby counsel did not take an active role).

reversal when "evidence could have been introduced and arguments made that likely could have affected the outcome of the [defendant's] competency hearings" because "it is impossible to say that the violation of [defendant's] Sixth Amendment rights did not pervade his entire trial." Collins, 430 F.3d at 1268; cf, United States v. Klat, 156 F.3d 1258, 1264 (D.C. Cir.1998) (remanding for hearing to determine whether "the competency hearing could have come out differently if appellant had been represented by counsel").

Had counsel been permitted to participate, the competency hearing would have been radically different. Indeed, the only two witnesses – both state experts -- were not cross-examined *at all* at the hearing. "Without some questioning of the experts concerning their technical conclusions, a factfinder simply cannot be expected to evaluate the various opinions, particularly when they are themselves inconsistent." Ford, 477 U.S. at 415 (citing Barefoot v. Estelle, 463 U.S. 880, 899 (1983)). For example, counsel could have questioned Dr. Stout about the significance of his testimony that Taylor, who previously renounced his former belief that he had died and come back to life, had recently given only equivocal answers on this issue, suggesting that he continued to believe that he had died in the past. Counsel could have cross-examined Dr. Farooque, the psychiatrist, about the effects that "tapering off" Taylor's antipsychotic medication could have on his competency, particularly in light of her testimony at the previous competency hearing that Taylor's mental condition rapidly deteriorated in 2002 (leading to incompetency) when she decreased his Zyprexa prescription. (Vol. 5, 604-605; Vol. 34, 142).

In addition, counsel could have called witnesses, including the treating physician, Dr. Arney, the court-appointed psychiatrist, Dr. Caruso, and lay witnesses to testify about Taylor's recent bizarre statements – such as his assertion that he wore sunglasses to protect himself from

the police's controlling radio waves. Through expert testimony counsel would have been able to introduce evidence about the side effects of Taylor's medications, including heavy sedation, and about the possible consequences of the recent change in Taylor's medications. This evidence – wholly missing from the inadequate hearing held by Judge Heldman – "likely could have affected the outcome" of the competency hearing. Collins, 430 F.3d at 1268. Accordingly, "it is impossible to say" that the violation of Taylor's right to counsel at the competency hearing "did not pervade his entire trial." Id.

D. JUDGE HELDMAN ERRED BY FAILING TO FOLLOW CONSTITUTIONALLY ADEQUATE PROCEDURES TO ENSURE THAT THE COMPETENCY HEARING WAS SUBJECT TO ADVERSARIAL TESTING

Because “[a] defendant has a constitutional right not to be tried while legally incompetent[,] a State’s failure to observe procedures adequate to protect a defendant’s right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial.” Medina v. California, 505 U.S. 437, 449 (1992) (internal quotations omitted). In this case, the non-adversarial competency hearing – at which the Court held that counsel, including potential defense witnesses Virginia Story and Edward Ryan, had no standing to participate and which utterly failed to submit the state's claim of competency to "the crucible of meaningful adversarial testing" – was inadequate to protect Taylor's right to not stand trial while incompetent and violated the Tennessee and Federal Constitutional due process protections. Alabama v. Shelton, 535 U.S. 654, 667 (2004) (citation omitted). "We have elected to employ an adversarial system of justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and

comprehensive." Taylor v. Illinois, 484 U.S. 400, 408-09 (1988) (citing United States v. Nixon, 418 U.S. 683, 709 (1974)).

The Supreme Court has emphasized the importance of subjecting the state's claims to the crucible of meaningful adversarial testing. Cronic, 466 U.S. at 655 ("Truth ... is best discovered by powerful statements on both sides of the question.") (internal citations and quotations omitted); Gardner v. Florida, 430 U.S. 349, 360 (1977) (citing "[o]ur belief that debate between adversaries is often essential to the truth-seeking function of trials..."); Polk County v. Dodson, 454 U.S. 312, 318 (1981) ("The [American criminal justice] system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.").

Thus, in evaluating whether a competency hearing passes constitutional muster, "the question is whether the government's case for competency was subject to meaningful adversarial testing." Collins, 430 F.3d at 1265. In O'Rourke v. Endell, 153 F.3d 560 (8th Cir. 1998), the Eighth Circuit considered a competency hearing where the defendant's appointed counsel advocated the position that the defendant was competent. 153 F.3d at 565. The Eighth Circuit determined that the defendant "should have been represented by an attorney, either a counsel of record or a 'next friend,' to argue [the contrary position]," and concluded that the "court's failure to appoint such a representative resulted in an evidentiary hearing on [the defendant's] competence that failed to develop adequately all material facts, that was neither full nor fair, and that did not afford [the defendant] the process he was due." Id. at 569. The Tenth Circuit reached a similar conclusion in Collins, reversing where counsel, although present at competency hearing, did not "subject the prosecution's competency case to 'meaningful adversarial testing.'" Collins, 430 F.3d at 1265-66 (citation omitted).

Many courts, including this Court, have held that requirement of adversarial testing mandates that defense counsel test the government's case regarding competency, even over the objection of the defendant. "The desire of a defendant whose mental faculties are in doubt to be found competent does not absolve counsel of his or her independent professional responsibility to put the government to its proof at a competency hearing when the case for competency is in serious question." Wilcoxson v. State, 22 S.W.3d 289, 305-06 (Tenn. Crim. App. 1999) (citing Hull v. Freeman, 932 F.2d 159, 168 (3d Cir. 1991) (overruled on unrelated grounds by Coleman v. Thompson, 501 U.S. 722 (U.S. 1991)); Appel, 250 F.3d 203 (counsel must advocate for defendant during competency hearing regardless of defendant's wishes); Shepard v. Superior Court of Los Angeles County, 180 Cal.App.3d 23 (1986) (holding trial court erred by removing counsel who would assert defendant's incompetence over defendant's objection); ABA STANDARDS FOR CRIMINAL JUSTICE STANDARD 7-4.2(c) (recommending that defense counsel move for evaluation of defendant's competence to stand trial whenever defense counsel has a good faith doubt and alert the court and prosecutor to facts which form the basis of the concern, even over the client's objection). The Tennessee Courts have recognized the right to adversarial testing when defining the minimum procedural requirements for a competency hearing on the question whether a defendant is competent to be executed. See Van Tran v. State, 6 S.W.3d 257, 271 (Tenn. 1999) (holding that such "hearing[s] shall be adversarial in nature".)

The protections of adversarial testing extend beyond merely the active participation of counsel to challenge the state's theory and include the affirmative presentation of evidence. In Ford v. Wainwright, the Supreme Court held that a basic component of the adversarial process demanded by due process concerns is the ability to present relevant mental health evidence.

Ford, 477 U.S. at 414 (plurality opinion). The Court explained the importance in the context of capital cases:

[A]ny procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate. 'The minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected.' ... [W]ithout any adversarial assistance from the prisoner's representative... the factfinder loses the substantial benefit of potentially probative information. The result is a much greater likelihood of an erroneous decision.

Ford, 477 U.S. at 414 (citation omitted).

In this case, the trial court actively limited the introduction of material, compelling evidence, in contravention of the clear mandate of Ford. Id. Judge Heldman refused to grant Edward Ryan, Taylor's conservator, standing to participate or testify about his recent change in medication, and compounded this error by refusing to permit Taylor's previously appointed counsel or former guardian from participating. Judge Heldman also personally selected the witness list by *sua sponte* directing only the state witnesses to attend – rather than including psychiatric experts with differing testimony, such as Dr. Caruso or appointing an independent expert. "[E]xpert psychiatric evidence that may differ from the state's own psychiatric examination" is a "basic" due process requirement. Ford, 477 U.S. at 427 (Powell, J., concurring). The preclusion of defense evidence, the selection of only State witnesses, combined with the denial of counsel, meant that the "fact-finding procedures" at Taylor's October competency hearing fell far short of the "heightened standard of reliability" necessary in capital cases. Ford, 477 U.S. at 411.

The failure to submit the state's case to adversarial testing was structural error and requires reversal. See, e.g., Henderson v. Frank, 155 F.3d 159, 169-71 (3d Cir. 1998). "[A]n

erroneous determination of competence threatens a fundamental component of our criminal justice system – the basic fairness of the trial itself." Cooper, 517 U.S. at 364 (citations omitted). The non-adversarial hearing on Taylor's competency failed to provide any reasonable protection against an erroneous determination and demands reversal. In the alternative, this Court should remand this case for a determination of whether a *nunc pro tunc* adversarial hearing can be convened on the defendant's competency to stand trial. See Appel, 250 F.3d at 218; State v. Snyder, 750 So.2d 832, 855 (La 1999).