IN THE

COURT OF APPEALS OF VIRGINIA

RECORD NO. 1363-22-3

ANTHONY TREMAINE STEWART,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

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STATEMENT OF THE CASE

Following a jury trial on February 25, 2022, Anthony Tremaine Stewart was convicted in the Circuit Court of Rockbridge County of five felonies: two counts of possession with intent distribute a Schedule I or II substance, third or subsequent offense; two counts of possession of a Schedule I or II substance; and one count of felon in possession of a concealed weapon. (R. 319-21). The circuit court sentenced Stewart to a total sentence of 43 years and 12 months, with 22 years and 12 months suspended. (R. 395-97).

The issue in this appeal concerns whether the trial court erred in determining that Stewart was competent to stand trial. In February 2019 and January 2020, neuropsychologist Dr. Scott Bender at the University of Virginia's Institute of Law, Psychiatry, and Public Policy evaluated Stewart and both times opined that he was incompetent to stand trial. (R. 1091-1112).

Approximately a year later, after Stewart's arrest on the charges in this case, Dr. Bender reevaluated Stewart and opined that he was competent to stand trial. (R. 1113-27). About a month before trial, the defense moved to dismiss the charges because Stewart had previously been declared unrestorably incompetent by a court in a separate case. (R. 253). Upon hearing argument on February 14, 2022, the trial court denied the motion to dismiss, accepting Dr. Bender's conclusion that Stewart was competent to stand trial. (R. 294-95, 539). This Court should affirm the trial court's ruling because it was not plainly wrong or without evidence to support it.

ASSIGNMENT OF ERROR

Stewart submits the following assignment of error:

> The Circuit Court erred in determining that Stewart was competent to stand trial where he had previously been determined to be unrestorably incompetent due to a permanent and irreversible traumatic brain injury, substandard IQ, learning disabilities and renal disease, had received no services subsequent to the determination that would have rendered him competent, and was unable to comprehend the nature of the proceedings or to give adequate assistant to his counsel to prepare a defense.

(Op. Br. 2).

STATEMENT OF FACTS AND PROCEEDINGS

A. Stewart's background

In 1995, at the age of 16, Stewart suffered a traumatic brain injury (TBI) in a motor vehicle accident. (R. 1116). The TBI worsened Stewart's preexisting learning disabilities and attention-deficit/hyperactivity disorder (ADHD). (R. 1116). While previous testing has shown Stewart's IQ to be in the extremely low range,[1] his cognitive abilities have improved some over time. (R. 1116).

In 2018, Stewart was diagnosed with stage 5 kidney disease. (R. 1116). In 2019, Stewart reported that he not been taking his diabetes medication. (R. 1116). While incarcerated in 2020, however, Stewart had been taking his medication. (R. 1117).

Since 2000, Stewart was evaluated for competency numerous times "with varying opinions across evaluators." (R. 1117). In fact, a few evaluators changed their opinion and found Stewart competent after previously concluding that he was incompetent. (R. 1118-19). For example, Dr. Luke Romanow and Dr. Brian Kiernan evaluated Stewart in 2017 and concluded that he was incompetent to stand trial, but after reevaluating him again a few months later, they found that he was competent. (R. 1119). Dr. Michael Bell evaluated Stewart in 2016 and 2017 and found him

[1] In 1995, following the accident, Stewart scored a 51 on an IQ test. (R. 1116). Testing in 2008 and 2015 showed his IQ to be 68. (R. 1116).

incompetent to stand trial, opining that it was unlikely Stewart would ever be able to reach competency. (R. 1120). Dr. Bell reevaluated Stewart in October 2019 and found him competent to stand trial, noting that Stewart's cognitive deficits due to the TBI were not as severe as the doctor originally thought. (R. 1120). Dr. Bell also concluded that Stewart "was aware enough to know how to try to avoid being found competent to stand trial." (R. 1120).

On February 5, 2019, Dr. Bender and a neuropsychology fellow, Dr. Matthew Clerr, evaluated Stewart and concluded that he was incompetent to stand trial, opining that he lacked a factual and rational understanding of his legal situation and was currently unable to participate meaningfully in his defense. (R. 1104). Dr. Bender evaluated Stewart again on January 16, 2020 and, for the reasons stated in his previous report, found him incompetent to stand trial. (R. 1120).

B. Dr. Bender's December 3, 2020 evaluation

After Stewart was arrested in October 2020 on the charges at issue in this appeal, Dr. Bender and Dr. Claire Bryson, a forensic psychology postdoctoral fellow, reevaluated Stewart. (R. 1113). The evaluation took place on December 3, 2020 and lasted approximately five hours. (R. 1113). Dr. Bender and Dr. Bryson reported their findings and conclusions in a fifteen-page letter to the general district court judge soon thereafter. (R. 1113).

As documented in the letter, Dr. Bender and Dr. Bryson reviewed numerous legal, medical, and mental health records, including several prior competency and neuropsychological evaluations dating back twenty years. (R. 1117-19). Their report also explained the various assessments performed and the doctors' observations of Stewart's performance. (R. 1120-25). The report described in detail Stewart's factual and rational understanding of his legal situation and his ability to assist counsel in his defense. (R. 1120-25).

In the conclusion section of the letter report, Dr. Bender and Dr. Bryson acknowledged that it was a "complex case" and that Stewart "has significant cognitive limitations for multiple reasons, which have at times impaired competency." (R. 1125). Dr. Bender and Dr. Bryson noted, however, that Stewart had improved since his prior evaluations at their facility and gave reasons for that improvement:

> In contrast to his most recent evaluations with us in 2019 and 2020, Mr. Stewart presented as much more alert, motivated, and engaged in the present evaluation. There are several possible reasons for this improvement: a period of abstinence from drug use, a stable diet, stable schedule and housing (due to incarceration), consistency in treatment-adherence for his medical conditions (i.e., dialysis, medications), and recovery from an exacerbation of his ESRD in 2018. Indeed, a screening test of his cognitive ability suggests improvement.

(R. 1125).

Dr. Bender and Dr. Bryson further explained that Stewart was more engaged when discussing his current legal situation:

> In addition, Mr. Stewart appeared particularly motivated to secure what he perceived to be a possible, desirable outcome in his case, and thus presented as more engaged in a discussion of his legal situation. As noted, his poor effort in the past has appeared to be, in large part, due to his cognitive deficits, such as poor attention and memory. During the present evaluation, these limitations persisted, but Mr. Stewart could more easily be redirected to rational discussions of his legal situation.

(R. 1125-26).

Dr. Bender and Dr. Bryson stated that Stewart's "factual understanding of the legal process is concrete, but on a broad, very basic level, he understands, the roles of legal personnel, the purpose of legal proceedings, and the charges against him" (R. 1126). In addition, Stewart's "appreciation of the legal process as applied to his own case was again very simple and concrete, but sufficiently rational with education." (R. 1126). Stewart was also "able to discuss the alleged offenses in a realistic, detailed manner, including possible evidence." (R. 1126). And while he would need adequate support to explain more complex concepts in concrete and simplified forms, Stewart appeared capable of rational decision making and collaboration with his attorney. (R. 1126).

Dr. Bender and Dr. Bryson concluded that Stewart "displayed an adequate factual and rational understanding of his legal situation, is currently able to participate meaningfully in his defense, and is thereby competent to stand trial." (R. 1126).

C. Relevant Proceedings

Following preliminary hearing and indictment (R. 76, 137, 146-53), Stewart hired new counsel in December 2021. On January 25, 2022, that counsel moved to dismiss the charges based on Stewart's alleged lack of competency. (R. 250-51). In his motion to dismiss, Stewart stated that, on November 9, 2020, Judge Malfourd Trumbo of the Circuit Court of Rockbridge County had found Stewart unrestorably incompetent in a separate case. (R. 250). Stewart argued that the Commonwealth failed to follow the provisions of Code § 19.2-169.3 because there had been no attempt to restore Stewart's competency since Judge Trumbo's order. (R. 250).

In its objection to the motion to dismiss, the Commonwealth noted that Judge Trumbo had dismissed the charges following his finding of Stewart's incompetence, and that those charges included none of the current charges. (R. 257). The Commonwealth argued that the general district court was entitled to order a new competency evaluation on the current charges, and that Dr. Bender's conclusion that Stewart was competent to stand trial on the current charges had not been refuted by any evidence. (R. 261).

The trial court conducted a hearing on Stewart's motion to dismiss on February 14, 2022. (R. 521). At the hearing, defense counsel did not challenge the fact that "unrestorably incompetent does not mean a[n] individual can never be restored to competency." (R. 523). Rather, defense counsel argued that Stewart was

unrestorably incompetent "because he suffered a traumatic brain injury that cannot be alleviated by medicine or treatment or anything else." (R. 523, 534). Defense counsel also argued that Stewart was incompetent because there had been no effort to restore Stewart to competency since Judge Trumbo's finding of incompetency. (R. 525, 533-36).

The prosecutor responded that a finding of incompetency does not require the defendant to receive treatment to restore competency. Rather, a court may dismiss the charges, which is what Judge Trumbo did. (R. 52, 537). The prosecutor noted that a reevaluation of Stewart was requested "based on conversations the police had with him at the time of his arrest in October, that gave [the prosecution] concern that perhaps he wasn't as incompetent as he was leading others to believe." (R. 532). The prosecutor urged the court to accept Dr. Bender's conclusion that Stewart was competent to stand trial on the new charges, noting that Dr. Bender had provided a rational explanation for Stewart's improvement. (R. 532, 537).

In denying the motion to dismiss, the trial court explained that it had reviewed Dr. Bender's detailed letter and noted that Stewart was not new to Dr. Bender. (R. 539). The court found no reason to question the doctor's conclusion that Stewart was competent to stand trial. (R. 539).

Beginning on February 24, 2022, Stewart was tried by a jury over the course of two days. (R. 564). The evidence at trial established that, on November 26, 2019,

State Trooper Dylan Welsh responded to call that a man, identified later as Stewart, was acting disorderly in an apartment complex. (R. 646). When Trooper Welsh went to speak to Stewart, he ran away on foot. (R. 1026). The trooper gave chase and, when he attempted to detain Stewart, they tumbled over a hill. (R. 650). Another deputy arrived and assisted in handcuffing Stewart. (R. 650). Stewart told the officers that he had methamphetamine on him. (R. 650). Trooper Welsh did not locate any drugs on Stewart's person, but did locate a cell phone charger, glasses, brass knuckles, and baggie of methamphetamine near where they had tumbled down the hill. (R. 653).

On October 6, 2020, police stopped Sarah Ruley and found an "eight ball" of methamphetamine in her possession. (R. 667). Ruley told police and testified at trial that Stewart provided those drugs to her, and that she had planned to sell the drugs and give Stewart a portion of the proceeds. (R. 670-72). A couple days later, Stewart texted Ruley asking about the money she owed him. (R. 688).

On October 7, 2020, police stopped a vehicle driven by Tabitha Wills in which Stewart was a passenger. (R. 738). Wills testified that, as the police approached the vehicle, Stewart removed a large bag of cocaine and marijuana from his pants and threw it in her lap, which she shoved into her pants. (R. 738-741). The police recovered an ounce of cocaine from Wills, which had a street value of $2800. (R.

800). Police also recovered a half gram of methamphetamine from the console and $1,000 in cash on Stewart's person. (R. 803).

On October 13, 2020, police stopped a vehicle driven by Christian Hobson in which Stewart was a passenger. (R. 845). Once again, Stewart tried to give the drugs to the driver as police approached. (R. 846). When Hobson refused to take the drugs, Stewart put the drugs in Stewart's "nether regions." (R. 847). Police recovered "a baggie of white powdery substance from in between [Stewart's] butt cheeks," which a lab analysis confirmed was methamphetamine. (R. 886).

After trial, the defense moved to set aside the verdict on the same grounds as his pretrial motion to dismiss regarding Stewart's competency. (R. 323). The Commonwealth filed an objection, arguing that Stewart's motion had no basis under Rule 3A:15 because he did not allege any error that had been committed during the trial itself or challenge the sufficiency of the evidence. (R. 327). The trial court denied the motion to set aside, noting that it would not reopen the issue of competency raised in Stewart's pretrial motion to dismiss. (R. 1030).[2]

[2] Prior to sentencing, Stewart filed a motion for a new competency evaluation. (R. 378-79). Stewart did not, however, present any evidence that there had been a change in circumstances to warrant such an evaluation. Following a hearing on the matter, the trial court denied the motion. (R. 385, 561). Stewart has not challenged this ruling on appeal.

ARGUMENT

I. The trial court was not plainly wrong or without evidence in finding that Stewart was competent to stand trial.

On brief, Stewart contends that "the record as a whole establishes that his neuro-cognitive disability renders him incompetent to stand trial as a matter of law and, thus, the circuit court abused its discretion in finding Stewart competent to stand trial." (Op. Br. 1-2). The trial court's factual finding of competency, however, was supported by evidence and not plainly wrong. Thus, this Court must affirm.

A. Standard of Review

"'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.'" *Dang v. Commonwealth*, 287 Va. 132, 144, 752 S.E.2d 885, 892 (2014) (quoting *Medina v. California*, 505 U.S. 437, 439 (1992)). "[T]o prove incompetency, a defendant must show by a preponderance of the evidence that he either lacks the capacity to understand the criminal proceedings against him or lacks the ability to assist counsel in his defense." *Grattan v. Commonwealth*, 278 Va. 602, 616, 685 S.E.2d 634, 642 (2009); *see also* Code § 19.2-169.1(E).

"A trial court's determination of a defendant's competency to stand trial is a question of fact and will not be reversed on appeal unless it is plainly wrong or without evidence to support it." *Grattan*, 278 Va. at 616-17, 685 S.E.2d at 642 (citing *Orndorff v. Commonwealth*, 271 Va. 486, 500, 628 S.E.2d 344, 351 (2006)). When

considering this issue on appeal, the evidence is viewed in the light most favorable to the Commonwealth, the prevailing party below. *Grattan*, 278 Va. at 616-17, 685 S.E.2d at 642 (citing *Orndorff*, 271 Va. at 500, 628 S.E.2d at 352).

B. The trial court was not plainly wrong in relying on Dr. Bender's and Dr. Bryson's findings and conclusions that Stewart was competent to stand trial on his current drug and weapon charges.

Relying on the standard of review for *ordering* a competency evaluation, not whether a competency determination was plainly wrong, Stewart argues that no reasonable jurist reviewing Stewart's history could conclude that Stewart was competent to stand trial. (Op. Br. 26, 29). In doing so, Stewart recognizes that "his argument in part involves matters of public policy which are generally not the province of the courts to address and rectify." (Op. Br. 24). Indeed, "[t]he legislature is the 'author of public policy'" not the courts. *Stokes v. Commonwealth,* 61 Va. App. 388, 398, 736 S.E.2d 330, 335 (2013) (quoting *Campbell v. Commonwealth*, 246 Va. 174, 184 n.8, 431 S.E.2d 648, 654 n.8 (1993)).

More significantly, this Court is "bound by decisions of the Supreme Court of Virginia." *Roane v. Roane*, 12 Va. App. 989, 993, 407 S.E.2d 698, 700 (1991). As previously stated, the Supreme Court of Virginia in *Orndorff* and *Grattan* held that a trial court's determination of competency "is a question of fact and will not be reversed on appeal unless it is plainly wrong or without evidence to support it." *Grattan*, 278 Va. at 616-17, 685 S.E.2d at 642 (citing *Orndorff*, 271 Va. at 500, 628

S.E.2d at 351). On questions of fact such as these, this Court does not substitute its judgment for that of the fact finder. *See, e.g., Chavez v. Commonwealth*, 69 Va. App. 149, 161, 817 S.E.2d 330, 336 (2018).

The Supreme Court of Virginia's opinions in *Orndorff* and *Grattan* illustrate the degree of deference that must be given to trial courts on competency determinations. Orndorff argued that the circuit court had erred in finding her competent to stand trial in the sentencing phase after she had suffered "dissociate episodes" in the courtroom. *Orndorff*, 271 Va. at 499, 628 S.E.2d at 351. The Supreme Court disagreed, holding that the circuit court's competency determination was supported by evidence and not plainly wrong. *Id*. at 500, 628 S.E.2d at 351.

The Supreme Court explained that the evidence showed that Dr. Wolber and Dr Sheneman, who had evaluated Orndorff over a period of months, concluded that her condition did not render her unable to understand the proceedings or assist counsel in her defense. *Id*. And "[a]lthough there was conflicting testimony regarding the issue of Orndorff's competency, the circuit court chose to rely the testimony of Dr. Wolber and Dr Sheneman." *Id*. at 501, 628 S.E.2d at 351. "Based on this evidentiary support for the circuit court's findings," the Supreme Court refused to disturb the trial court's factual finding on appeal. *Id*.

Grattan similarly argued that the circuit court was plainly wrong in finding him competent to stand trial. *Grattan*, 278 Va. at 616, 685 S.E.2d at 642. He

maintained that the competency evaluations prepared by his experts, "along with the facts of the crime, his bizarre behavior, his inability to communicate with his attorneys, and his refusal to meet with mental health experts prove[ed] his incompetency." *Id.* at 616, 685 S.E.2d at 642. In addition, Grattan argued that the evaluation of the Commonwealth's expert, Dr. Hagan, "was inadequate because he performed no testing and declined to give an opinion as to whether Grattan suffer[ed] from a mental illness." *Id*.

The Supreme Court concluded that the circuit court's determination that Grattan was competent to stand trial was not plainly wrong or without evidence to support it. *Id*. at 617, 685 S.E.2d at 643. The Supreme Court noted that, in reaching his conclusion that Grattan was competent, Dr. Hagan had relied on jail records, the evaluations of the defense experts, his personal observations of Grattan in court and in jail, and his seventy-four-minute interview with Grattan. *Id*. And when presented with conflicting opinions, the circuit court elected to accord more weight to Dr. Hagan's testimony over the defense's experts. *Id*. The Supreme Court refused to disturb that factual finding on appeal. *Id*. at 618, 685 S.E.2d at 643.

As in *Orndorff* and *Grattan*, the trial court's determination here that Stewart was competent to stand trial was supported by evidence and was not plainly wrong. The trial court relied on the evidence from Dr. Bender's and Dr. Bryson's evaluation of Stewart. (R. 539). As the trial court recognized, Dr. Bender knew Stewart very

well, having evaluated him twice before for competency. (R. 539). Indeed, Dr. Bender's opinion regarding Stewart's competency carried significant weight considering that he had twice opined that Stewart was incompetent to stand trial.[3]

Dr. Bender and Dr. Bryson evaluated Stewart for approximately five hours and reported their findings and conclusions in a detailed fifteen-page letter. (R. 1113). Their report included a history of Stewart's prior competency evaluations and medical conditions. (R. 1113-20). Their report noted that, contrary to the previous evaluations with Dr. Bender, Stewart was much more alert, motivated and engaged during the evaluation. (R. 1125-26). A screening test also showed an improvement in Stewart's cognitive ability. (R. 1125).

The doctors gave several possible reasons for Stewart's improvement: a period of abstinence from drug use, a stable diet, a stable schedule and housing, consistency in treatment for his medical conditions, and recovery from an exacerbation of his renal disease. (R. 1125). The report did not shy away from the fact that Stewart has cognitive limitations and will need adequate support. (R. 1126). The doctors nonetheless concluded that Stewart displayed an adequate factual and rational understanding of his legal situation, was able to participate meaningfully in his defense, and thus was competent to stand trial. (R. 1126).

[3] Dr. Bender's previous competency evaluations of Stewart were introduced as a defense exhibit at the hearing on the motion to dismiss. (R. 526).

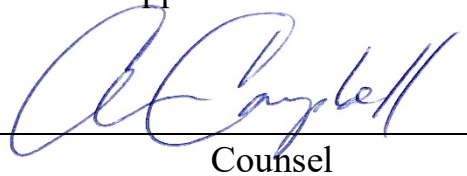
As evidenced by *Orndorff* and *Grattan,* a trial court is entitled to rely on the expertise of the doctors who performed the competency evaluation when determining whether a defendant is competent to stand trial. Here, viewing the evidence in the light most favorable to the Commonwealth, the trial court was not plainly wrong or without evidentiary support in relying on that expertise in finding Stewart competent to stand trial on these charges.

CONCLUSION

For these reasons, the judgment of the Circuit Court for Rockbridge County should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein

By: 
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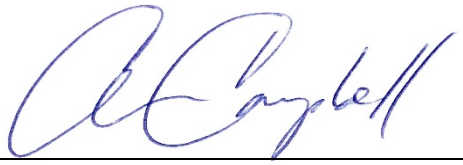
CERTIFICATE OF TRANSMISSION AND SERVICE

On February 7, 2023, this brief was filed electronically with this Court in compliance with Rule 5A:19(f). A copy was emailed to John S. Koehler, Esq. at john@jamessteelelaw.com, counsel for appellant. The undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities and certificate, contains 3,659 words.

The Commonwealth desires to present oral argument in this case.



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