OA 5-7-86

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,659

ROBERTO VASQUEZ,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Respondent, the State of Florida, was the appellee in the District Court and the prosecution in the trial court. The Petitioner, Roberto Vasquez, was the Appellant in the District Court and the defendant below. The parties will be referred to as they stood before this Court. The symbol "A" will be used to designate the Appendix to this brief. The symbol "P" refers to the brief of the Petitioner.

STATEMENT OF THE CASE AND FACTS

The Respondent rejects the Petitioner's Statement of the Case and Facts. Respondent vestates the Case and Facts as follows:

A two count indictment was filed on April 26, 1979 against the Petitioner, Roberto Vasquez. (R:1) Count one of the indictment charged the petitioner with first degree murder. (R:1) Count two of the indictment charged the petitioner with the unlawful possession of a firearm while engaged in a criminal offense. (R:1-2).

The Honorable Richard S. Hickey, Judge of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, ordered an evaluation of the petitioner's

sanity. (R:5) Pursuant to a hearing, Judge Hickey adjudicatd the petitioner incompetent. (R:6)

On September 9, 1981, the Honorable Maria Korvick, Judge of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, ordered a psychiatric evaluation to be performed on the petitioner. (R:8) An order was entered adjudicating the petitioner incompetent on September 25, 1981. (R:10)

On May 24, 1984, Judge Korvick issued an "Order to Transport and Notice of Hearing" to inquire into the petitioner's competency and the possible need for continued involuntary hospitalization. (R:12-13) At this August, 1984 hearing, Dr. Segundo Corripio indicated that the petitioner was suffering from functional depression and not from an organic problem. (T_1:49)[1]

Dr. Albert Jaslow questioned why the petitioner was not being treated for depression at the North Florida Treatment Center. (T_1:85) The petitioner was receiving medication for the treatment of psychosis. (T_1:85)

Dr. Jaslow felt that the dosage of the anti-depressant

[1]The petitioner's "functional depression" resulted from his low self esteem and lack of ego development. (T:50)

medication should have been increased. (T_1:87, 97) Other anti-depressant medication and treatments could have been used. (T_1:96-97) Perhaps more importantly, Dr. Jaslow stated that there was a good possibility that the Petitioner was malingering. (T:89)

> "Well, there were little statements that were made through my contact with him that suggested that possibly that he had greater understanding than he was demonstrating to me or stating to me."
>
> (T_1:94)

Dr. Jaslow would not rule out the possibility that with a different treatment approach the petitioner would be restored to a competent mental state within a year. (T_1:99) Psychosis and depression are two very distinct mental illnesses. (T_1:101)

Dr. Anastio Castiello examined the petitioner on three separate occasions over a period of five years. (T_1:106) He stated that the petitioner misrepresented information to him during these examinations. (T_1:106-107) In short, the petitioner was withholding information and fabricating his behavior. (T_1:107-108) Dr. Castiello concluded that the petitioner was not acting spontaneously, but was acting in conformity with his best interests. (T_1:112)

The trial court found that other types of non-experimental medications in different dosages could have been administered to the petitioner. (T_2:29) The court also noted that the petitioner might be misrepresenting his condition to the physicians. (T_2:29) Judge Korvick concluded that she could not find that there was no substantial probability that the petitioner will become mentally competent to stand trial in the foreseeable future. (T_2:29)

Therefore, the trial court refused to dismiss the charges against the petitioner. (T_2:29-30) On September 6, 1984, the trial court entered an order adjudicating the petitioner incompetent to stand trial and committing him for treatment under Fla.Stat. §397.467(1). (R:22-26) A Notice of Appeal was filed on September 27, 1984. (R:27)

The Third District held that if it was to reach the merits of the appeal, it would affirm the decision of the trial court because the decision was supported by substantial competent evidence. [A.1-2] However, the court held that because the petitioner must remain involuntarily hospitalized, dismissal of the charges would have no real effect on him and therefore he cannot challenge the trial court's ruling. [A.2]

SUMMARY OF THE ARGUMENT

The petitioner is subject to involuntary hospitalization. The "dismissal" of the charges against the petitioner would have not impact on his status.

If the petitioner is no longer subject to involuntary hospitalization, the State Attorney may refile the charges within thirty days after the anticipated release of the defendant. Therefore, the Third District construed Rule 3.213(b) of the Florida Rules of Criminal Procedure as a rule of judicial administration. It operates to clear the calendar of cases where the claimant has no cognizable injury.

Turning to the merits of the case, there was competent and substantial evidence in the record to support the trial court's ruling. A reviewing court could not find that the trial court abused its discretion.

ARGUMENT

I

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DID NOT AFFECT THE FLORIDA PROVISIONS ON COMPETENCE TO STAND TRIAL. AN ABSENCE OF A RULING ON THE MERITS WOULD NOT HAVE AN INJURIOUS IMPACT ON THE PETITIONER.

In the instant case, both the defense and the prosecution stipulated that the petitioner was subject to involuntary hospitalization. (T:21) Fla.Stat. §394.467(1) defines the criteria for involuntary civil commitment: "A person may be involuntarily hospitalized if he is mentally ill and likely to injure himself or others if not hospitalized." With respect to proceeding against an accused, a Florida court must consider these same criteria for commitment after it finds a criminal defendant incompetent to stand trial. See Winick and De Meo. "Competence to Stand Trial in Florida." 35 U. Miami L. Rev. 31 (1980)

At this juncture, it is instructive to examine the comprehensive criteria for commitment outlined in Florida Rule of Criminal Procedure 3.211(b)(1):

> (i) The nature and extent of the mental illness or mental retardation suffered by the defendant;
>
> (ii) Whether the defendant, because of such mental illness or

> mental retardation meets the criteria for involuntary hospitalization or placement set forth by law;
>
> (iii) Whether there is a substantial probability that the defendant will attain competence to stand trial within the foreseeable future;
>
> (iv) The nature of the case and treatment to be afforded the defendant and its probable duration;
>
> (v) Alternatives other than involuntary hospitalization which might be less restrictive on the defendant's liberty.

The petitioner's stated distinctions between Chapter 394 of the Florida Statutes ("the Baker Act") and Chapter 916 ("Mentally Deficient and Mentally Ill Defendants") are cosmetic at best. (P:13-16) A defendant who is incompetent to stand trial under Fla.Stat. §916.18 is to receive the full protection of Part I of the Baker Act.[1] Because the commitment of the incompetent defendant is tied to the civil commitment requirements, equal protection and procedural due process issues are avoided.[2] Moreover, the least restrictive alternative provision (v, above) offers a defendant

[1]See Fla. Stat. §916.18 Program for Treatment of Patients Involuntarily Hospitalized Because Incompetent to Stand Trial

[2]Winick and De Meo. "Competence to Stand Trial in Florida." 35 U. Miami L. Rev. 31, (1980).

the possibility of community based treatment.[3]

The "dismissal" of the charges against the petitioner would have no real impact on his status. Fla.R.Crim.P. 3.213(b) If a defendant continues to meet the involuntary commitment criteria, the court must either commit the defendant to the Department of Health and Rehabilitative Services for involuntary hospitalization or placement under the Baker Act, or order that he receive outpatient treatment at any other facility.[4] In the alternative, the court is to require the administrator of the facility in the order of the commitment to notify the State Attorney within thirty days of the defendant's release.[5]

Fla.Stat. §916.14 provides that the statute of limitations and the defense of former jeopardy are inapplicable to criminal charges dismissed because of the defendant's incompetence to stand trial. As previously noted, the State Attorney has the authority to refile the charges within thirty days after the anticipated release of the defendant. Fla.R.Crim.P. 3.213(b), Ricciardelli v. State, 453 So.2d 199

[3]Id, at 47.

[4]Id, at 60 Both the Baker Act and Florida Rule of Criminal Procedure 3.211(b) advocate the use of the least restrictive available treatment.

[5]Id, at 60, n.158. The State Attorney has the opportunity to contest release.

(Fla. 4th DCA 1984) Moreover, contrary to the petitioner's assertion, he will not remain "wrongfully incarcerated" because under comprehensive commitment criteria, less restrictive alternatives to hospitalization are available. Fla.R.Crim.P. 3.211(b)(1)

Rule 3.213 of the Florida Rules of Criminal Procedure[6] is a procedural device. Warwick v. State, 443 So. 2d 188 (Fla. 3d DCA 1983) It acts as a rule of judicial

[6]Rule 3.213 Continuing Incompetency to Stand Trial: Disposition

(2) If at any time after five years determining a person incompetent to stand trial when charged with a felony or one year when charged with a misdemeanor, the court, after hearing, determines that the defendant remains incompetent to stand trial, that there is no substantial probability that the defendant will become mentally competent to stand trial in the foreseeable future, and that the defendant does not meet the criteria for involuntary hospitalization set forth by law, or for involuntary admission to residential services as set forth by law, it shall dismiss the charges against the defendant.

(b) If at any time after five years after determing a person incompetent to stand trial when charged with a felony or one year when charged with a misdemeanor, the court, after hearing, determines that the defendant remains incompetent to stand trial, that there is no substantial probability that the defendant will become mentally competent to stand trial in the foreseeable future and that the defendant does meet the criteria for involuntary hospitalization set forth by law, the court shall dismiss the charges against the defendant and commit the defendant to the Department of Health and Rehabilitative Services for involuntary hospitalization or residential services solely under the provisions of law, or may order that he receive outpatient treatment at any other facility or service on an outpatient basis subject to the provisions of those statutes. In the order of commitment, the judge shall order that the administrator of the facility notify the State Attorney of the committing circuit no less than 30 days prior to the anticipated date of release of defendant.

administration (A.2) especially where judgment sought to be reviewed is not adverse to the claimant. Enterkin v. Pate, 354 So.2d 938 (Fla. 1st DCA 1978), Peterson v. State ex rel Harvey, 28 So.2d 868 (Fla. 1947), Credit Industrial Co. v. Re-Mark Chemical Co., 67 So.2d 540 (Fla. 1953), King v. Brown, 55 So.2d 187 (Fla. 1951), Witt v. Baars, 36 Fla. 119, 18 So. 330 (Fla. 1895), Bessemer Properties, Inc. v. City of Opalocka, 74 So.2d 296 (Fla. 1954)

In accordance with the reasoning of the Third District Court of Appeal in the instant case, the petitioner would be unaffected by a dismissal of the charges and therefore he has not incurred any cognizable injury. Geiger v. Sun First National Bank of Orlando, 422 So.2d 815 (Fla. 5th DCA 1983), General Development Corp. v. Kirk, 251 So.2d 284 (Fla. 2d DCA 1971) In order to have standing to litigate, a party must show he has incurred, or is in immediate danger of incurring, a direct and personal injury resulting from the violation of a constitutional or statutory right designed to protect that party. Ray Baillie Trash Hauling, Inc. v. Kleppa, 447 F.2d 696 (5th Cir. 1973), Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), Laird v. Tatum, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972), Association of Data Processing Organizations, Inc. v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25

L.Ed.2d 184 (1970), Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970)

In Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972), the Supreme Court found an equal protection violation due to Indiana's standards for commitment and release applicable to those committed solely because of their lack of capacity to stand trial and comparable standards governing civil commitment. The Court also held that a State could not indefinitely confine an accused, "solely on account of his incapacity to proceed to trial," without determining the likelihood that he would regain competency. Id, at 738, 92 S.Ct. 1845, 32 L.Ed.2d 435.

In Garrett v. State, 390 So.2d 95 (Fla. 3d DCA 1980), rev. den., 399 So.2d 1146 (Fla. 1981), cert. den., 454 U.S. 1004, 102 S.Ct. 544, 70 L.Ed.2d 409, reh. den., 454 U.S. 1165, 102 S.Ct. 1041, 71 L.Ed.2d 322 (1981), the Court reversed the respondent's conviction because he had been committed to a State hospital longer than necessary to assess the likelihood of his eventual recovery of competency to stand trial.

But as a matter of due process, the Jackson Court held,

> "[A] person charged by a State with a criminal offense who is committed solely on account of his in capacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant."
>
> Id, at 738, 92 S.Ct. 1845, 32 L.Ed.2d 435.

The Jackson Court recognized that its holding did not speak to the power of the State to try, and thus to convict, the accused once he has regained competency to face charges. Id, at 739-740, 92 S.Ct. 1845, 32 L.Ed.2d 435 The District Court of Appeal in Garrett reversed the respondent's conviction "on the basis that, under the holding of Jackson v. Indiana, ...he should never have been brought to trial." 390 So.2d at 96 But Jackson did not address the State's authority to bring an accused to trial.[7]

The remedy for a violation of the constitutional right

[7]The Jackson Court noted its decision in Greenwood v. United States, 350 U.S. 366, 76 S.Ct. 410, 100 L.Ed. 412 (1956) which upheld the pretrial commitment of a defendant under 18 USC §§42.44 to 42.46, "even though there was little likelihood that he would ever become competent to stand trial." In addition to being found incompetent, Greenwood was also dangerous.

not to be indefinitely imprisoned solely on a determination that one is incompetent to stand trial is not a dismissal of the criminal charges. Warwick, supra. (concurrence of Pearson, J.) Similarly, a "dismissal" of the charges in the case sub judice would not prohibit the State Attorney from refiling the charges against a competent defendant who no longer meets the civil commitment criteria.[8]

[8]See note 5, supra.

II

THE TRIAL COURT'S RULING ON THE SUBSTANTIAL PROBABILITY OF THE PETITIONER BECOMING COMPETENT IN THE FORESEEABLE FUTURE SHOULD NOT BE SET ASIDE UNLESS AN ABUSE OF DISCRETION IS SHOWN.

It is the function of the trial court to resolve factual disputes pertaining to the competency of an accused. Fowler v. State, 255 So.2d 513 (Fla. 1971) A reviewing court should defer to the fact finding authority of the trial court and should not substitute its judgment for that of the trial court. State v. Melendez, 392 So.2d 587 (Fla. 4th DCA 1981)

Moreover, the credibility of witnesses and the weight of the evidence rests within the discretion of the trial court, especially where the record supprots its findings. DeConingh v. State, 433 So.2d 501 (Fla. 3d DCA 1983), Brock v. State, 69 So.2d 344 (Fla. 1954), Poynter v. State, 443 So.2d 219 (Fla. 4th DCA 1983) There was competent and substantial evidence to indicate that the petitioner was misrepresenting his condition to at least two of the examining physicians. (T_1:89, 94, 106-108) Moreover, the petitioner, although suffering from depression, was being treated primarily for psychosis. (T_1:49, 85)

The trial court must be affirmed absent a showing that it abused its discretion. King v. State, 387 So.2d 463 (Fla. 1st DCA 1980) Even if the expert testimony is conflicting, it was the trial court's responsibility to resolve the disputed factual issue; and the record does not reveal an abuse of discretion in the weighing of the evidence. Fowler, supra. There was adequate testimony to support the trial judge's finding in the instant case. Ferguson v. State, 417 So.2d 631 (Fla. 1971)

CONCLUSION

Based upon the foregoing legal authority, the decision of the Third District Court of Appeal should be affirmed. Because the petitioner was still subject to involuntary hospitalization, a dismissal of the charges would not alter his status. On the merits, there was competent and substantial evidence to support the ruling of the trial court. Therefore, the Third District could not find an abuse of discretion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was furnished by mail to PAUL MORRIS, PA, Specially Appointed Counsel, 2600 Douglas Road, Penthouse II, Coral Gables, Florida 33134, on this 22nd day of April, 1986.

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