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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-2365

BERNARD DOUGHERTY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

STATEMENT OF THE FACTS 1

Mr. Dougherty Is Charged, Declared Incompetent, Tried & Convicted. 1

The Fifth District Remands For Resentencing; Mr. Dougherty Raises A Question Regarding His Competency. 2

The Fifth District Denies Mr. Dougherty's Appeal. 6

SUMMARY OF THE ARGUMENT 8

ARGUMENT 8

I. THE FIFTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND THE FOURTH DISTRICT COURT OF APPEAL. 8

II. THERE IS NO TEXTUAL SUPPORT FOR THE FIFTH DISTRICT'S DECISION BELOW. 13

CONCLUSION 15

CERTIFICATE OF SERVICE 17

CERTIFICATE OF COMPLIANCE..17

TABLE OF AUTHORITIES

Cases

Brown v. State,
245 So. 2d 68 (Fla. 1971) 10

Cooper v. Oklahoma,
517 U.S. 348 (1996) 8

Dougherty v. State,
96 So. 3d 984 (Fla. 5th DCA 2012).. passim

Fowler v. State,
255 So. 2d 513 (Fla. 1971) 11

Jackson v. State,
880 So. 2d 1241 (Fla. 1st DCA 2004)...11

Jones v. State,
No. 4D11-3756, 2013 WL 30147137 (Fla. 4th DCA June 19, 2013).................11

Macaluso v. State,
12 So. 3d 914 (Fla. 4th DCA 2009).. 11, 12

McCray v. State,
71 So. 3d 848 (Fla. 2011). 10

The Florida Bar v. Trazenfeld,
833 So. 2d 734 (Fla. 2002) 15

Statutes

FLA. STAT. § 916.12 .... 13, 14

Rules

FLA. R. APP. P. 9.210...17

FLA. R. CRIM. P. 3.210 .... 9, 14, 15

FLA. R. CRIM. P. 3.211..9, 14

FLA. R. CRIM. P. 3.212 .... passim

FLA. R. CRIM. P. 3.214 9

STATEMENT OF THE FACTS

Mr. Dougherty Is Charged, Declared Incompetent, Tried & Convicted.

The State of Florida charged Bernard Dougherty with resisting an officer with violence, acquiring a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge, and criminal use of personal identification information. R-40-41.

Before trial, in April of 2002, the lower court appointed three experts to examine Mr. Dougherty. R-114-16. Following that evaluation, on April 11, 2002, the trial court declared Mr. Dougherty incompetent to proceed. R-115-18. In its order, the court noted that Mr. Dougherty was "diagnosed as having a psychotic disorder . . . ." R-125. Nine months later, on January 24, 2003, the court ordered Mr. Dougherty returned to the county jail after the Florida State Hospital reported that he "no longer me[t] the criteria for continued commitment . . . ." R-138.[1]

Mr. Dougherty appeared before the trial court in February of 2003. When his case was called, his attorney advised the court that Mr. Dougherty was present for a "comp review." *Dougherty v. State*, 96 So. 3d 984, 985 (Fla. 5th DCA 2012). Defense counsel advised the court that "[a]pparently, the hospital feels Mr. Dougherty is capable of going forward . . . ." *Id*. The lawyer added, "I talked to

[1] The record contains what appears to be a second Order to Transport and Notice of Hearing that is incomplete and lists a different return date. R-141-42. The differences between the two orders are not relevant to this appeal.

Mr. Dougherty briefly this morning, and he feels he's ready to go forward. We would like to have this set for the next docket sounding." *Id.*

On July 10, 2003, defense counsel moved to determine Mr. Dougherty's competency to stand trial. R-150. The trial court appointed three experts to evaluate Mr. Dougherty. R-151-54. At a hearing on September 10, 2003, defense counsel advised the court that Mr. Dougherty was competent to proceed. "We did get the evaluations back from the three doctors, so we will stipulate he is competent to proceed." R-837. The trial court made no further inquiry regarding Mr. Dougherty's competence and his case proceeded to trial.

A jury found Mr. Dougherty guilty of resisting an officer with violence and acquiring a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge. R-175-76. The State dismissed the criminal use of personal identification charge. R-179, 729-30. Mr. Dougherty received consecutive, ten-year sentences for the remaining counts as a habitual felony offender. R-793-94.

The Fifth District Remands For Resentencing; Mr. Dougherty Raises A Question Regarding His Competency.

On April 19, 2009, Mr. Dougherty filed an amended motion to correct an illegal sentence. R-685-699.[2] The trial court summarily denied the amended

[2] Mr. Dougherty's initial motion raised three claims, two of which were denied with prejudice. R-701. The trial court found the third claim to be legally insufficient and granted Mr. Dougherty leave to amend. *Id.* The trial court's order also advised Mr. Dougherty that he had thirty days to appeal. R-702. The Fifth

motion and Mr. Dougherty appealed. R-703-720. The Fifth District reversed, finding, in part, that the trial court erred in sentencing Mr. Dougherty as a habitual felony offender for the charge of acquiring a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge. *Id.* at 730.

On July 2, 2010, Mr. Dougherty appeared for resentencing. At that hearing, defense counsel raised the issue of Mr. Dougherty's competency:

> [DEFENSE ATTY.]: Judge, sorry. I don't think we need to make a decision as to sentencing today. Mr. Dougherty indicates to me now that he was and has been incompetent since before his trial, and that he was never evaluated.
>
> Judge, I don't have his file. Mr. Dougherty is claiming he did not have his competency hearing on the issue of his competency. I don't have the underlying file. I don't know. I'd have to rely upon what the State has.
>
> [STATE ATTY.]: I believe the court file reflects, Judge, that Mr. Dougherty originally back in 2002 was committed to the state mental hospital as incompetent to proceed. He was subsequently determined competent in February of '03, and returned back here. Three doctors were then appointed by - - it was either Judge Silvernail or Judge Rainwater. I don't recall which one had it originally.
>
> On September 10 of 2003 a competency hearing was held. The three doctors that had reevaluated him upon his return all found that he was competent. The defense stipulated to the reports. The court found him competent

District dismissed that appeal finding that "[i]f leave to amend has been given by the trial court, a defendant may not appeal until an order denying the motion is entered without leave to amend. *Id.*

> to proceed, and we proceeded to a jury trial in February of '04.
>
> To my knowledge, there's been no determination that he's incompetent since that time.
>
> [DEFENSE ATTY.]: Your Honor, Mr. Dougherty says that in spite of what [the State Atty.] has said to the Court, that he did not have his hearing as to his competency, and that he said that the reports were entered into, and the reports are what the judge used in making his determination, that he didn't have a hearing.
>
> I have inquired as to who represented [sic] in the past regarding that matter. It was the Office of the Public Defender. So right now, given the allegations made, I believe I would have a conflict, and our office didn't properly represent him for a hearing in which a determination had been made as to his competency, that he didn't have witnesses brought forth, that it was just reports that were read. Somebody had to stipulate to that. And if that stipulation was done, it would have been done with permission of Mr. Dougherty, who says he never had that option.
>
> And to appoint conflict counsel.
>
> ***
>
> [Mr. Dougherty] indicates that he's not competent to proceed, was not competent to proceed in the past, never had his hearing. Whatever the Court decides at this point, I just have to leave it up to the Court, but the objections have been made . . . .

R-803-06. Based on this and other representations made by defense counsel regarding Mr. Dougherty's prior convictions, the trial court continued the sentencing hearing. R-806.

On August 11, 2010, Mr. Dougherty again appeared for sentencing. Immediately, defense counsel raised the issue of Mr. Dougherty's competence:

> Judge, there's another issue I think we need to address . . . .
>
> ***
>
> Mr. Dougherty has raised the issue that potentially he was - - the trial proceeded before he was found to be - - found competent in a lawful manner.
>
> There's a case out of the Fourth DCA from July 8th now that says that lawyers can't stipulate to restore competency without an evidentiary hearing. That's [sic] no record in the court file that there was that kind of a hearing held. So I think it's just an issue that needs to be raised on appeal with the DCA. I'll get in touch with them regarding that. We'll need to order the transcript from that hearing. It was September 10th, 2003. And see if he's able to appeal that decision.
>
> ***
>
> So it's still not clear at this point whether or not he's going to be able to raise the issue of competency, and whether there was a proper competency hearing held on September 10th, 2003, and he was legally brought to trial, would still be incompetent for jurisdictional purposes.
>
> Then there's some question as to whether or not that's going to be able to be addressed on a direct appeal from this last resentencing, or if he might have to follow it up on his own or with private counsel as on a 3.850.

R-817-19. The trial court did not address Mr. Dougherty's competency claims. Instead, the court adjudicated Mr. Dougherty a habitual felony offender as to count

one – resisting an officer with violence. R-822. The trial court explained that "the reason for my doing that is essentially I'm just confirming what was previously done by the prior circuit judge, so correcting the order to apply only as to count one." R-822-23.

The Fifth District Denies Mr. Dougherty's Appeal.

Mr. Dougherty appealed the trial court's denial of his amended motion to correct his illegal sentence. The appellate court affirmed, finding that the trial court found Mr. Dougherty competent "based upon the stipulation of defense counsel . . . ." *Dougherty*, 96 So. 3d at 985.

The appellate court noted that Mr. Dougherty was initially declared incompetent in August of 2002. *Id.* After the Department of Children and Families determined that he no longer met the criteria for involuntary commitment, Mr. Dougherty was sent back to the county jail. *Id.* In February of 2003, Mr. Dougherty appeared for what the appellate court characterized as a "competency hearing." *Id.* Immediately after the case was called, defense counsel announced:

> Your Honor, this is Mr. Dougherty who just returned from the State Hospital. This would be a comp review.
>
> Apparently, the hospital feels Mr. Dougherty is capable of going forward and we would request that since they feel he's capable of going forward, I talked to Mr. Dougherty briefly this morning, and he feels he's ready to go forward. We would like to have this set for the next docket sounding.

Id. The State did not object and the court set the matter for a docket sounding in April of 2003. *Id.*

Four months later, defense counsel filed a motion to determine Mr. Dougherty's competence, after which the trial court appointed three experts to conduct evaluations. *Id.* At a hearing in September of 2003, defense counsel again stipulated that Mr. Dougherty was competent to proceed. *Id.* In its decision, the Fifth District specifically emphasized the following representation by defense counsel: **"We did get the evaluation back from the three doctors, so we will stipulate he is competent to proceed."** *Id.* (emphasis in original). The case proceeded to trial without any additional reference to Mr. Dougherty's competence. *Id.*

On appeal, Mr. Dougherty argued that he did not receive a proper competency hearing. *Id.* Rejecting this argument, the Fifth District explained that "[i]t is apparent from the record that the trial court found [Mr. Dougherty] competent to proceed based upon the representation and stipulation of defense counsel." *Id.* "Because [Mr. Dougherty] stipulated to the written reports at a properly scheduled competency hearing," the court reasoned that "the trial court was authorized to base its competency finding on the written reports." *Id.*

SUMMARY OF THE ARGUMENT

This Court has long emphasized that trial courts are the final judges of an accused's competence to stand trial. The trial court's central role requires that judges make an independent evaluation of the evidence regarding competency. That evidence may come in the form of live testimony or reports prepared by experts appointed by the court and/or retained by the defense. In no case, however, can the trial court delegate its adjudicative function to the parties. Even where the parties agree to waive a competency hearing and stipulate to experts' reports, the trial court must still conduct its own evaluation of the evidence. The Fifth District's decision here sharply departs from this well-established precedent, allowing the parties to stipulate to competence. In so doing, the Fifth District – contrary to this Court's precedent – has improperly removed the trial court from the competency determination process.

ARGUMENT

I. THE FIFTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND THE FOURTH DISTRICT COURT OF APPEAL.

"[T]he criminal trial of an incompetent defendant violates due process." *Cooper v. Oklahoma,* 517 U.S. 348, 354 (1996) (internal citations omitted). In Florida, "[a] person accused of an offense . . . who is mentally incompetent to proceed at any material stage of a criminal proceeding shall not be proceeded

against while incompetent." FLA. R. CRIM. P. 3.210(a). A "material stage of a criminal proceeding," includes

> the trial of the case, pretrial hearings involving questions of fact on which the defendant might be expected to testify, entry of a plea, violation of probation or community control proceedings, sentencing, hearings on issues regarding a defendant's failure to comply with court orders or conditions, or other matters where the mental competence of the defendant is necessary for a just resolution of the issues being considered.

FLA. R. CRIM. P. 3.210(a)(1).

To ensure that the State does not proceed against an incompetent person, Florida has enacted a comprehensive framework that (1) allows for the appointment of experts to evaluate an accused that may be incompetent, FLA. R. CRIM. P. 3.211; (2) lists the factors that experts must consider when determining an accused's competence, FLA. R. CRIM. P. 3.211(b); (3) compels experts to provide written findings, FLA. R. CRIM. P. 3.211(d); and (4) provides for a hearing after which the accused will be adjudged competent or incompetent to proceed, FLA. R. CRIM. P. 3.212(b)-(c). This same framework applies to those who may be deemed incompetent to proceed to sentencing. FLA. R. CRIM. P. 3.214.

The trial court plays a central role in any competency determination. Thus, while the court may appoint experts to evaluate the accused, "[t]he report on the Defendant's sanity by a psychiatrist or other expert is merely advisory to the Court,

which itself retains the responsibility of the decision." *Brown v. State*, 245 So. 2d 68, 70 (Fla. 1971). This Court explained in *Brown* that

> even prior to the enactment of Chapter 917, Florida Statues, the law was settled in this state that the circuit court which has jurisdiction of the offense and has ample means and power to determine the question of mental ability of the person accused to plead the indictment and prepare his defense.

Id. (internal quotation marks and citations omitted) (ellipses in original). A trial court's discretion extends to resolving disputes among experts' opinions regarding an accused's competence. "[W]hen the experts' reports or testimony conflict regarding competency to proceed, it is the trial court's responsibility to consider all the relevant evidence and resolve such factual disputes." *McCray v. State*, 71 So. 3d 848, 862 (Fla. 2011).

The *Brown* court explained that the purpose of former Rule 1.210(a) "was to aid and assist" the trial court "to determine whether the Defendant is in such a mental state that further proceedings in any pending criminal case must be proceeded with or stayed during a period of necessary treatment." *Brown*, 245 So. 2d at 71. The current rule also places the trial court at the center of the adjudicatory process. *See*, *e.g.*, FLA. R. CRIM. P. 3.212(b) (directing that "[t]he court shall first consider the issue of the defendant's competence to proceed. If the court finds the defendant competent to proceed, the court shall enter its order so finding and shall proceed.").

The fact that the trial court plays a central role in competency determinations does not mean that the hearing requirement cannot be waived. But, even in those situations, the trial court retains the primary duty of adjudicating the accused's competence. Thus, in *Fowler v. State*, this Court explained that "where the parties and the judge agree, the trial court may decide the issue of competency on the basis of the written reports alone." 255 So. 2d 513, 515 (Fla. 1971); *compare Jones v. State,* No. 4D11-3756, 2013 WL 30147137 (Fla. 4th DCA June 19, 2013) (explaining that where the parties stipulated to the expert reports, the reports became the evidence upon which the trial court could decide the ultimate issue) with *Jackson v. State*, 880 So. 2d 1241, 1243 (Fla. 1st DCA 2004) (finding error where the trial court ruled on competency on the basis of certain medical reports without the parties' agreement).

A stipulation by the parties, however, does not relieve the trial court of its duty to independently determine the accused's competence. The trial court must still consider the evidence submitted and agreed to by the parties and, on that basis, determine whether the accused is competent to proceed. The Fourth District's decision in *Macaluso v. State*, illustrates the point. 12 So. 3d 914 (Fla. 4th DCA 2009). Macaluso was initially found incompetent to stand trial. *Id.* at 915. Five months later, defense counsel informed the court that Macaluso had been found competent based on "evaluations that were obtained by the Public Defender's

Office." *Id.* Without a further hearing or evidence, the court declared Macaluso competent to proceed to trial. *Id.* Before the jury was selected, defense counsel added that doctors had found Macaluso competent to be tried. *Id.*

Finding that the trial court failed to properly adjudicate Macaluso's competency, the Fourth District explained, "[a] defendant who has been found incompetent to proceed is presumed to remain incompetent to proceed until adjudicated competent by the court. The court must hold a hearing and enter an order finding that the defendant is competent before proceedings may resume." *Id.* The appellate court concluded that if Rule 3.212 "wanted lawyers to be able to stipulate to restored competency without an evidentiary hearing, it would have so stated in explicit terms." *Id.*

The rule in Florida, as explained by this Court, and the Fourth District, requires the trial court to make an independent determination of an accused's competence. That determination cannot be delegated to a third party, whether it be those experts evaluating or defending the accused. The decision of whether an accused is competent to stand trial falls squarely upon the trial court. While the parties may waive a competency hearing and may even stipulate to the body of evidence that the trial court must consider, the trial court must still make an independent determination. In relieving the trial court of the duty to determine Mr. Dougherty's competence to stand trial, the Fifth District's decision expressly and

directly conflicts with prior decisions of this Court and the Fourth District Court of Appeal.

II. THERE IS NO TEXTUAL SUPPORT FOR THE FIFTH DISTRICT'S DECISION BELOW.

A key problem with the Fifth District's ruling below is that it lacks any textual support. There is no rule or statute that authorizes the trial court to dispense with its independent duty to determine an accused's competence to stand trial.

Under Section 916.12(2), Florida Statutes, it is the trial court that retains the authority to appoint experts to evaluate the accused, to determine the number of experts to conduct the evaluation, to determine whether the accused should be committed based upon the experts' recommendations, and to set a hearing and take testimony from the experts:

> A defendant must be evaluated by no fewer than two experts before the court commits the defendant or takes other action authorized by this chapter or the Florida Rules of Criminal Procedure, except if one expert finds that the defendant is incompetent to proceed and the parties stipulate to that finding, the court may commit the defendant or take other action authorized by this chapter or the rules without further evaluation or hearing, or the court may appoint no more than two additional experts to evaluate the defendant. Notwithstanding any stipulation by the state and the defendant, the court may require a hearing with testimony from the expert or experts before ordering the commitment of a defendant.

§ 916.12 (2), FLA. STAT. The plain text of Section 916.12(2), however, does not allow the trial court to delegate its role as the ultimate finder of fact to any third parties, including expert witnesses or trial counsel.

In implementing these specific statutory requirements, FLA. R. CRIM. P. 3.210(b) places the trial court at the helm of the competency determination process. If at any "material stage" of the proceedings, the trial court "of its own motion, or on motion of counsel for the defendant or for the state, has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition . . . ." FLA. R. CRIM. P. 3.210(b). As part of this process, the trial court shall have the authority to appoint experts to evaluate the accused. FLA. R. CRIM. P. 3.211(a). Once the experts have completed their evaluation, "[t]he court shall first consider the issue of the defendant's competence to proceed . . . ." FLA. R. CRIM. P. 3.212(b). The court will then determine that either the accused is competent to proceed, or incompetent, necessitating further action. FLA. R. CRIM. P. 3.212(b)-(c).

In denying Mr. Dougherty's appeal, the Fifth District explained that "[i]t is apparent from the record that the trial court found Appellant competent to proceed based upon the representation and stipulation of defense counsel." *Dougherty*, 96 So. 3d at 985. This reasoning runs counter to Section 916.12(2), Florida Statutes,

and also FLA. R. CRIM. P. 3.210 and 3.212. By removing the trial court from the adjudicatory process and allowing competency to be determined "upon the representation and stipulation of defense counsel," the Fifth District eliminated the trial court's role as the ultimate judge of Mr. Dougherty's competence. *Dougherty*, 96 So. 3d at 985. And yet FLA. R. CRIM. P. 3.212(b) specifically notes that it is the trial judge that "shall" determine competence. *See The Florida Bar v. Trazenfeld*, 833 So. 2d 734, 738 (Fla. 2002) (explaining that "[t]he word 'may' when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word 'shall.'"). The trial court here did not have the discretion to accept any stipulation by defense counsel regarding Mr. Dougherty's competence.

CONCLUSION

Based on the foregoing points and authorities, Mr. Dougherty asks this Court to reverse his convictions and remand with instructions that the trial court conduct a competency determination.

Dated: July 9, 2013

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was sent by via e-mail this 9th day of July 2013 to the party listed below.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the font requirements contained in FLA. R. APP. P. 9.210(a)(2).

s/ Carlos F. Gonzalez__________
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