ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

R. Ferrell Cothran, Jr., Circuit Court Judge

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S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

MIKE SALLEY,

PETITIONER

APPELLATE CASE NO. 2012-212233

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the Court of Appeals err in finding that the trial judge did not err in finding that appellant was competent to stand trial when appellant proved, by a preponderance of the evidence, that he did not have a rational understanding of the proceedings against him and that he did not have the ability to consult with his lawyer with a reasonable degree of rational understanding?

STATEMENT

In May of 2009, the Aiken County Grand Jury indicted Salley for assault with intent to commit criminal sexual conduct with a minor first degree, indictment #2009-GS-02-827. On February 8, 2010, the Honorable R. Ferrell Cothran, Jr. heard testimony from both the State and the Defense in regard to Salley's competency to stand trial. On February 11, 2010, Judge Cothran found Salley competent to stand trial. On February 12, 2010, Salley appeared before Judge Cothran, Jr. and pled guilty but mentally ill as charged. Pursuant to negotiations with the State, Judge Cothran sentenced Salley to 25 years. A timely notice of intent to appeal and Rule 203 explanation was served on February 19, 2010.

On February 22, 2012, the South Carolina Court of Appeals affirmed the sentence and conviction. State v. Salley, Op. No. 2012 – UP- 091 (S.C.Ct.App. filed February 22, 2012). On March 8, 2012, counsel filed a petition for rehearing. Pursuant to a request from the Court of Appeals, the State filed a return to the petition for rehearing on March 20, 2012. On May 4, 2012, the Court of Appeals denied the petition for rehearing. On August 6, 2012, counsel filed a petition for writ of certiorari. The State filed a return on August 7, 2012. This Court granted the petition for writ of certiorari on October 4, 2013. This brief of petitioner follows.

ARGUMENT

The Court of Appeals erred in finding that the trial judge did not err in finding that appellant was competent to stand trial when appellant proved, by a preponderance of the evidence, that he did not have a rational understanding of the proceedings against him and that he did not have the ability to consult with his lawyer with a reasonable degree of rational understanding

The trial judge found that appellant, Mike Salley, was competent to stand trial. The judge based his finding on the erroneous premise that appellant did not meet his burden of proof when the expert who testified on behalf of the defense, Dr. Schwartz-Watts, found Salley not competent to stand trial because he can't process information quickly enough on cross examination. (R. p. 69, lines 21 – p. 70, lines 1-12). While Dr. Schwartz-Watts testified that appellant would not be able to testify on cross examination (R. p. 48, lines 1-8) she also found appellant not competent based on a number of other factors contained in her report and discussed below, specifically finding that he didn't have a rational understanding of the proceedings and was not able to assist his attorney. (R. p. 62, lines 23 – p. 63, lines 1-3). Appellant met his burden of proving that he was not competent to stand trial. The trial judge erred in finding that the defense failed to meet the burden of proving appellant was not competent to stand trial. The trial judge's finding that appellant is competent is against the preponderance of evidence showing that appellant was not competent.

The appellant has a long documented history of mental retardation and had previously been found not competent to proceed to trial in 2004, by the South Carolina Department of Disabilities and Special Needs. (R. p. 97-99). During a Blair[1] hearing on February 8, 2010, two experts provided conflicting testimony in regard to appellant's competency to stand trial. Dr. Donna Schwartz-Watts, a forensic psychiatrist, examined Salley for competency. In her written report Dr.

[1] State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

Schwartz-Watts wrote, "It is my opinion to a reasonable degree of medical certainty that Mr. Salley does not have a factual or rational understanding of the proceedings nor the capacity to assist you in his defense due to his mental retardation. He is not likely to become competent in the foreseeable future." (R. p. 94-95).

At the Blair hearing Dr. Schwartz-Watts was qualified, without objection, as an expert witness in the field of forensic evaluations. (R. p. 39, lines 16-21). . Dr. Schwartz-Watts testified, "The issue I have is he is what I call not rationally competent. And what I mean by that is he doesn't have the cognitive abilities to follow a trial. Dr. Cornelius stated it took three years for him to learn the roles of court officials and to gather information. And I don't think most trial take three years. And so what we're asking him to do in a trial situation is to learn new information, be able to remember it, be able to provide it back to his attorney to assist in his defense. He just does not have the cognitive ability to do that." (R. p. 41, lines 20 – p. 42, lines 1-5).

Pursuant to a court order dated December 4, 2008, Phillip T. Cornelius, Ph.D. and forensic examiner for the South Carolina Department of Disabilities and Special Needs examined Salley for competency to stand trial. In a written report signed on January 23, 2009, Dr. Cornelius found Salley competent to proceed to trial. (R. p. 89). The report confirms Salley's history of mental retardation. The report indicates that Salley was difficult to understand due to a speech impediment. According to the report, Salley informed examiners that he graduated from Wagner High School with a certificate. Salley informed examiners that he had never had a job but would occasionally earn money by cutting grass and raking leaves. Salley reported receiving a $400 disability check. The report references prior test results showing IQ levels between 42 and 59. The report states that Salley was unable to name the months of the year, unable to name states other than South Carolina,

unable to read a simple three word phrase, unable to copy a geometric design, unable to perform a simple subtraction problem and unable to name the first president or the president elect.

During the Blair hearing, Dr. Cornelius was qualified as an expert in the field of forensic psychological evaluations. (R. p. 6, lines 4 – p. 7, lines 1-20). Dr. Cornelius testified that Salley was competent to proceed to trial. (R. p. 8, lines 12-18). Dr. Cornelius testified that when he evaluated Salley in 2004, he was not competent to stand trial. (R. p. 12, lines 23 – p. 13, lines 1-2; R. p. 97-99). Dr. Cornelius evaluated Salley again in 2007, and found him competent to stand trial. (R. p. 100). Dr. Cornelius explained the difference in the evaluations testifying:

> When I initially evaluated him in 2004 he was not competent to stand trial. He didn't understand the roles of his attorney, the defense, the solicitor, the court process. In 2007 when I evaluated him, he understood that the jury was the people that decided guilt or innocence. He understood that he shouldn't talk to the solicitor by himself. He had some confusion between the roles of his attorney and the solicitor. We did an education process during the interview and after that he was able to enunciate the roles of his attorney and the solicitor as I just described.
>
> When he came back in 2009 and at the time I saw him again he had retained that information because he was able to, without any education, enumerate his attorney's role, the solicitor's role, the court process, and whether or not he should talk to the solicitor by himself.

(R. p. 12, lines 24 – p. 13, lines 1-15).

Despite the "education process" that, according to Dr. Cornelius, rendered Salley competent, Dr. Cornelius admitted that he still had questions about whether Salley was able to understand the concept of a plea bargain. (R. p. 32, lines 11 – p. 33, 34, lines 1-6). Dr. Cornelius admitted that his evaluation was based on a structured "forced choice" interview. When asked about the significance of IQ, Dr. Cornelius testified, "Not entirely, because our process is based on an interview, a structured interview. It's based on a structured forced choice interview for most of the

questions. Because the research shows that if you have somebody that you suspect is mentally retarded that you get a better evaluation using the forced choice format rather than an open –ended format." (R. p. 18, lines 11-18). When asked to define forced choice format Dr. Cornelius testified, "That's asking him a question that has two answers. Is your attorney for you or against you, rather than saying, what does your attorney do, which side's your attorney on; those kinds of things." (R. p. 18, lines 22-25).

When Dr. Schwartz-Watts was asked if Salley would be able to assist his attorney at trial, she testified, "In my opinion, no. Again, the methodology used, court is not a forced choice test. To be competent to stand trial is to be able to follow testimony, to be able to pay attention to witnesses. If there's an inconsistency he can't protect himself in some ways because of his rational limitation, his cognitive limitation." (R. p. 43, lines 23 – p. 44, lines 1-3). When questioned on cross examination, Dr. Schwartz-Watts testified, "Well, my opinion is he has a factual understanding of the proceedings. He has a capacity to assist in his defense, but because he doesn't have a rational understanding, that second prong, because he doesn't have a rational understanding of the proceedings, he's not able to assist his attorney." (R. p. 62, lines 23 – p. 63, lines 1-3).

Dr. Schwartz-Watts' report states that Salley believes that the judge is against him, he does not understand concepts such as cross examination, he has difficulty learning new information, he is not able to abstract similarities between objects, he can not perform mathematical calculations and when asked if he would choose a sentence of 24 months or 3 years he replied 3 years because it was smaller. (R. p. 97-99). Dr. Schwartz-Watts testified, as did Dr. Cornelius, that Salley was unable to copy a geometric design. (R. p. 50, lines 19 – p. 51, lines 1-7; R. p. 96). Dr. Schwartz-Watts testified as to specific examples demonstrating Salley's brain deficits including the inability to learn how to pronounce his lawyer's name (R. p. 47, lines 5-20), and the inability to abstract similarities.

(R. p. 49, lines 16 – p. 50, p. 51, lines 1-12). Dr. Schwartz-Watts also testified that based on Salley's history with alcohol abuse, neuropsychological testing should be done to determine brain function. (R. p. 45, lines 10-25). When asked if additional testing would change her mind in regard to Salley's competency, Dr. Schwartz-Watts testified "It would probably strengthen my opinion, your Honor. Honestly." (R. p. 66, lines 11-16). Evidence at the Blair hearing established, by a preponderance of the evidence, that Salley was not competent to stand trial.

On February 11, 2010, after hearing testimony at the Blair hearing and reviewing the evidence presented, Judge Cothran found that the defense failed to meet their burden of proving that Salley was not competent to stand trial by a preponderance of the evidence. The judge stated:

> Dr. Schwartz-Watts' opinion, she basically had the same finding but she has some concerns that she didn't - - she did not think he was competent because she did not think that he had the ability to process the information quick enough on cross examination, that withstood cross-examination.
>
> And I don't think that's the test in this state. And I certainly think that being able to assist his attorney, and Dr. Cornelius found that he would be able to recognize if someone was not telling the truth and advise his attorney to that effect.
>
> In the end he even told Dr. Schwartz-Watts that he were to lie, even if his attorney told him to tell the truth, if he thought it would benefit him. So I think he has that understanding of the proceedings.
>
> And the defense has to present evidence that he in fact does not have the ability and is not competent to stand trial. I think that evidence must be by the preponderance of the evidence. And I certainly don't find by the preponderance of the evidence that they have met their burden and I think he is competent to stand trial.

(R. p. 68, lines 21 – p. 69, lines 1-17). The judge based his finding on the erroneous premise that Dr. Schwartz-Watts found Salley not competent to stand trial because he can't process information quickly enough on cross examination. (R. p. 69, lines 21 – p. 70, lines 1-12). While Dr. Schwartz-

Watts testified that Salley would be unable to testify because of his low IQ (R. p. 48, lines 1 – 13), she also testified that Salley did not have the ability to pay attention during trial, to remember facts and to confer with his attorney when new information was presented. (R. p. 49, lines 8-15). Dr. Schwarz-Watts also testified that Salley did not have the ability to weigh options. (R. p. 49, lines 11-15). Defense counsel argued, citing Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), that Dr. Schwartz-Watts' testified that Salley was incompetent because he did not have a rational understanding of the proceedings against him and was unable to consult with his attorney with a reasonable degree of rational understanding. (R. p. 70, lines 19 – p. 71 – 73). The judge again found Salley competent to stand trial. The judge erred.

"It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." Drope v. Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 903, 43 L.Ed.2d 102, 112 – 113 (1975). Conviction of a criminal defendant who is not competent violates the due process clause of the fourteenth amendment. Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed2d 815 (1966). This right may not be waived by guilty plea. Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992). Competency is required to ensure that [the defendant] has the capacity to understand the proceedings and to assist counsel. Godinez v. Moran, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993). The test of competency to enter a plea is the same as required to stand trial. State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976). In Hall v. Catoe, 360 S.C. 353, 359, 601 S.E.2d 335, 338 (2004), the South Carolina Supreme Court wrote, "This Court has held that to be competent to stand trial or continue trial, a defendant must have 'a rational, as well as factual, understanding of the proceedings against him' and the 'ability to consult with his lawyer with a reasonable degree of rational

understanding.' State v. Bell, 293 S.C. 391, 395-96, 360 S.E.2d 706, 708 (1987) (citing Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960))."

A defendant must prove that he is incompetent to stand trial by a preponderance of the evidence. State v. Weik, 356 S.C. 76, 81, 587 S.E.2d 683, 685 (2002); State v. Reed, 332 S.C. 35, 39, 503 S.E.2d 747, 749 (1998). The trial judge's ruling will be upheld on appeal if supported by the evidence and not against its preponderance. State v. Weik, 356 S.C. 76, 81, 587 S.E.2d 683, 685 (2002). The trial judge's ruling in the present case is not supported by the evidence.

The undisputed evidence before the judge was that Salley is mentally retarded with an IQ between 42 and 59 and was unable to name the months of the year, unable to name states other than South Carolina, unable to read a simple three word phrase, unable to copy a geometric design, unable to perform a simple subtraction problem and unable to name the first president or the president elect. It is undisputed that Salley was previously found not competent to stand trial and was later found competent only after an "education process." The State's examination of Salley consisted of a structured forced choice interview and the State's expert still had concerns about whether Salley was able to understand the concept of a plea bargain. Additionally, the defense introduced credible detailed testimony and evidence proving that Salley did not have a rational understanding of the proceedings against him and did not have the ability to consult with his lawyer with a reasonable degree of rational understanding. The judge erred in finding that the defense failed to meet their burden of proving that Salley was not competent to stand trial by a preponderance of the evidence.

> In affirming the conviction and sentence the Court of Appeals wrote:
>
> Mike Tyrel Salley appeals his guilty plea to assault with intent to commit first-degree criminal sexual conduct with a minor, arguing the trial court erred in finding he was competent to stand trial. We

> affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 596 (1992) ("The test of competency to enter a plea is [that] . . . [t]he accused must have sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him."); State v. Weik, 356 S.C. 76, 81, 587 S.E.2d 683, 685 (2002) ("The defendant bears the burden of proving his lack of competence by a preponderance of the evidence, and the trial [court]'s ruling will be upheld on appeal if supported by the evidence and not against its preponderance.").

State v. Salley, Op. No. 2012 – UP- 091 (S.C.Ct.App. filed February 22, 2012).

The Court of Appeals overlooked the fact that the judge based his finding that petitioner did not meet the burden of proving he was not competent to proceed on the erroneous premise that the defense expert witness, Dr. Schwartz-Watts, found Salley not competent to stand trial because he can't process information quickly enough on cross examination. When trial counsel asked the judge he if he found she had not met her burden of proof with regard to petitioner's competency to stand trial, the trial judge stated, "It's nothing that – I'm not suggesting you did anything wrong. It's simply based on the evaluation of the doctor, that I have her opinion that he's not but her opinion – what she's saying he's not, because he's not quick enough to process information on cross-examination. But she found that he responded appropriate in everything else." (R. p. 69, lines 21 – p. 70, lines 1-2).

Dr. Schwartz-Watts found Salley not competent to stand trial because he did not have a rational understanding of the proceedings and he could not assist his attorney at trial **not** merely because he is not quick enough to process information on cross examination. When Dr. Schwartz-Watts was asked if Salley would be able to assist his attorney at trial, she testified, "In my opinion, no. Again, the methodology used, court is not a forced choice test. To be competent to stand trial is to be able to follow testimony, to be able to pay attention to witnesses. If there's an inconsistency

he can't protect himself in some ways because of his rational limitation, his cognitive limitation." (R. p. 43, lines 23 – p. 44, lines 1-3). When questioned on cross examination, Dr. Schwartz-Watts testified, "Well, my opinion is he has a factual understanding of the proceedings. He has a capacity to assist in his defense, but because he doesn't have a rational understanding, that second prong, because he doesn't have a rational understanding of the proceedings, he's not able to assist his attorney." (R. p. 62, lines 23 – p. 63, lines 1-3). .

While Dr. Schwartz-Watts testified that Salley would be unable to testify because of his low IQ (R. p. 48, lines 1 – 13), she also testified that Salley did not have the ability to pay attention during trial, to remember facts and to confer with his attorney when new information was presented. (R. p. 49, lines 8-15). Dr. Schwartz-Watts also testified that Salley did not have the ability to weigh options. (R. p. 49, lines 11-15). The testimony and findings of Dr. Schwartz-Watts established by a preponderance of the evidence that Salley lacked sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and lacked a rational understanding of the proceedings against him. Her findings are supported by the admission from the State's expert witness that he still had questions about whether Salley was able to understand the concept of a plea bargain. (R. p. 32, lines 11 – p. 33, 34, lines 1-6). Salley was not competent to enter the guilty plea.

The State argues that because the trial judge's ruling in regard to appellant's competency to stand trial is supported by the evidence, there is no basis to reverse his ruling on appeal. The trial judge, however, misinterpreted the testimony of Dr. Schwartz-Watts and as a result his ruling is not supported by the record. The record supports the finding that appellant met his burden in establishing that he was not competent to proceed to trial.

The present case is easily distinguished from State v. Nance, 320 S.C. 501, 466 S.E.2d 349 (1996). In Nance, as in the present case, the trial judge was presented with conflicting expert testimony in regard to competency. The trial judge found Nance competent to stand trial and this Court affirmed that finding writing, "Admittedly, the trial court was confronted with conflicting opinions regarding Appellant's competency. However, we find that there is ample evidentiary support for the trial court's determination that Appellant was competent, and we find that determination not to be against the preponderance of the evidence." Nance, 320 S.C. at 506, 466 S.E.2d at 352 (citation omitted). Importantly, in Nance the State's experts found that Nance's actions indicated malingering, not psychosis. There is no evidence of malingering in the present case.

In State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987), the trial judge was also confronted with conflicting testimony in regard to competency. In Bell the appellant challenged the State's expert opinions based on the fact that they did not interview defense counsel to determine if appellant was assisting with his defense. This Court found that the trial judge's determinations of competency had evidentiary support and were not against the preponderance of the evidence. In contrast, the trial judge's finding in the present case is against the preponderance of evidence showing that appellant was not competent.

In State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999), as in Bell and Nance, the trial judge was confronted with conflicting testimony in regard to testimony. Davis was mentally retarded with an IQ of 66. 309 S.C. at 333, 422 S.E.2d at 138 n.1. This Court found that the trial judge's finding that Davis was competent had evidentiary support. In the present case appellant is mentally retarded with an IQ of between 42 and 59 who was unable to name the months of the

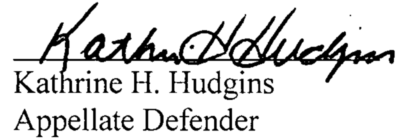
year, unable to name states other than South Carolina, unable to read a simple three word phrase, unable to copy a geometric design, unable to perform a simple subtraction problem and unable to name the first president or the president elect. The trial judge's finding in the present case that appellant was competent lacks evidentiary support.

The trial judge's finding that appellant was competent to stand trial was based on a misinterpretation of the testimony of the defense expert witness and was against the preponderance of evidence showing that appellant is not competent. Appellant's conviction violates the due process clause of the fourteenth amendment. The conviction should be reversed.

CONCLUSION

Based on the above argument, the conviction and sentence should be reversed.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 3rd day of February, 2014

STATE OF SOUTH CAROLINA

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THE STATE,

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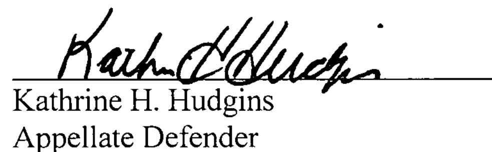
MIKE SALLEY,

PETITIONER

APPELLATE CASE NO. 2012-212233

CERTIFICATE OF SERVICE

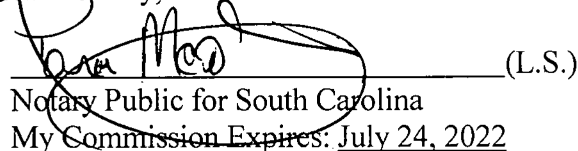
I certify that a true copy of the brief of petitioner, in this case has been served on Mark R. Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also upon Mr. Mike Salley # 339340 Kirkland Correctional Institution 4344 Broad River Road Columbia, SC 29210 this 3rd day of February, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day
of February, 2014.


(L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022