

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Clarendon County

Honorable Brian M. Gibbons, Circuit Court Judge

MARCO ANDRE CLARK,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001475

SUPPLEMENTAL APPENDIX

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State of South Carolina)
)
County of Clarendon)
)

The State of South Carolina,
Plaintiffs

vs: Motions Hearing

Marco Clark,
Defendant

General Sessions Court
July 7, 2009

Before The Honorable Howard P. King, Judge.

a P P E A R A N C E S:

Ms. Amy A. Land,
Assistantn Solicitor for the State

Mr. Harold L. Devoe,
Public Defender

Margaret T. Sullivan,
Court Reporter

1 THE COURT: The next matter, I believe,
2 involves a matter of the State versus Marco Clark.
3 In Indictment 09-GS-14-069. I believe, Ms. Land,
4 you said that is the next matter you have on the
5 trial roster for trial, is that correct?

6 MS. LAND: That's correct, Judge.

7 THE COURT: And the State is prepared to
8 go forward?

9 MS. LAND: The State is prepared, yes,
10 sir.

11 THE COURT: You said you did not have a
12 motion, and I did not either. I did not have a
13 Motion for a Competency Evaluation. What I have
14 is a request from Mr. Devoe that I approve funds
15 for a private competency evaluation. And that's
16 what we need to take up. Let me, and I do have
17 received from Mr. Devoe, I think we have got from
18 the Solicitor's Office, the South Carolina Mental
19 Health Department's evaluation dated 6/12/09, less
20 than a month ago.

21 MS. LAND: I am sorry.

22 THE COURT: Go ahead.

23 MS. LAND: I thought it was 5/12. I'm
24 sorry, I was looking at the Order, itself. I'm
25 sorry.

1 THE COURT: The date of the interview was
2 6/3/09 and the date of the report is 6/12/09 is
3 what I see. And I haven't quite finished. Let me
4 just finish reading. All right.

5 Mr. Devoe, I've had a chance to review the
6 report of the Department of Mental Health. It
7 appears to me that he was before the Department of
8 Mental Health only on the issue of competency to
9 stand trial. Not both criminal responsibility and
10 competency to stand trial. Is that correct?

11 MR. DEVOE: That's correct, Your Honor. I
12 believe the Order does say just competency to
13 stand trial.

14 THE COURT: All right. The State and the
15 Report of the Mental Health, we will introduce it
16 as a Court's Exhibit for purposes of this hearing.
17 But it does indicate that it is pretty clear to me
18 that the Department of Mental Health professionals
19 found that he was competent to stand trial. I'll
20 be glad to hear from you as to why you think a
21 private evaluation is necessary.

22 MR. DEVOE: Your Honor, the part that
23 bothers me in the report is at the conclusion it
24 states, like this before, which states that
25 although Mr. Clark did not voice any delusions but

1 returning to the interview, it is possible he
2 could develop delusions about his legal situation
3 before we move forward with his case. Plus it is
4 recommended the Court be attentive to the
5 statements he may make, which suggest he had
6 become delusional about his attorney or legal
7 affairs or legal situation.

8 That is an unusual to say the least,
9 recommendation. Hence, the Judge decides whether
10 he is delusional or not. I think also in this
11 report I think it says within it but not quite,
12 where he actually got out 3 Rivers Correctional
13 Institution on December 2nd. And this happened
14 the next day. December 3rd. He was supposed to
15 be going to counseling. And the next day, in
16 Kingstree, a count of drugs.

17 THE COURT: Well while they didn't
18 evaluate him for criminal responsibility, they say
19 he was able to recite the facts with some clarity.
20 On page 7, I am questioning Mr. Clark about a
21 clear, detailed account of the events that lead up
22 to and occurred at the time of the alleged
23 offenses.

24 So apparently he didn't have any problem
25 recalling at the time what happened. And of

1 course we are not talking about criminal
2 responsibility here either. We are talking about
3 competency to stand trial, because that's what
4 this report deals with. I will be glad to hear
5 from you if you have got -- if you think that
6 there is....

7 MR. DEVOE: I think perhaps I made a
8 mistake in asking just for the competency to stand
9 trial versus criminal responsibility. Some of the
10 facts in the case are, as I understand it, that
11 the night he got out, he went to a place, it was a
12 nightclub. Some kind of gathering place, in this
13 area to dance. Then these two other individuals
14 suggested that they go and -- he goes in to rob
15 the store and he said okay. And then he was the
16 one they gave the gun to and asked to go in the
17 store. And the store had been robbed. He knew
18 the attendant at the store, because they went to
19 high school with each other.

20 And the whole scenario acts as though he
21 didn't -- again, really have any idea of what the
22 depth of what the problems he was creating for
23 himself. There is no question he did rob the
24 store. There is no question the other two drove
25 him there. And the other two are -- got

1 probation. I just think he didn't have any deep
2 understanding that you just don't take a gun and
3 go to a store. I mean this whole scenario of his
4 life in and out of mental institutions. In and
5 out at least 10 times of these institutions.

6 THE COURT: Why didn't you request an
7 evaluation to determine criminal responsibility at
8 the time you requested this?

9 MR. DEVOE: I frankly thought I had, and I
10 didn't. But the one that was signed is the one
11 that prepared my request. And I guess, I can't
12 explain why I didn't. I normally would have, and
13 I can't understand why it was not done in this
14 case.

15 THE COURT: Ms. Land.

16 MS. LAND: Your Honor, I think that the
17 evaluation was a thorough one. It found that he
18 was competent to stand trial. I don't think that
19 there was any evidence that he was not competent
20 at the time of the incident. I think that to
21 pursue that would just be delaying his time before
22 he goes to SCDC. I think that if the report
23 states that he can clearly recall the facts of
24 that date, and recalls on, that reflects that he
25 was clearly competent. I don't have any other

1 argument for that.

2 THE COURT: What's the basis of the
3 request of this amount, Mr. Devoe? Do you have an
4 estimate from anybody as to what the cost would
5 be?

6 MR. DEVOE: I talked to Mr. Howle
7 concerning what I should ask for. And he said
8 make sure you go high, because to make sure you
9 don't have to go back for a second request.

10 THE COURT: Well that is exactly what the
11 problem with the indigent defense funding.

12 MR. DEVOE: Well he is, of course, the
13 head of the public defender corporation. I don't
14 think we need anything close to that, but I just
15 want to err on the side of caution.

16 THE COURT: I am sure everybody knows the
17 leading case of South Carolina for evaluations for
18 competency to stand trial are State vs. Blair.
19 And the citation of State vs. Blair 273 S.E. 2d.,
20 536, 1981 case. And that's the competency to
21 stand trial standard. Also South Carolina follows
22 its traditional test of McNaghten to determine
23 criminal responsibility. And that's contained in
24 S.C. Code Section 17-24-10(A). Of course, the
25 McNaghten case is very old English case. Very,

1 very old English case. In fact, it's a 1843 case
2 that held that a defendant is insane if at the
3 time of the crime, he suffered a disease of the
4 mind that caused a defect of reason such that he
5 was unable to know the wrongfulness of his actions
6 or to understand the nature of his acts.

7 For a defendant who has the capacity to
8 distinguish moral legal right from wrong, but due
9 to mental illness or defect lacks sufficient
10 capacity to conform his conduct to the requirement
11 of the law, this is of course governed by code
12 section 17-24-20(A).

13 The case of State vs. Covin 372, S.C. 428,
14 641 S.E.2d 612, a 2007 case, holds that a decision
15 to order an evaluation for competency to stand
16 trial is within the court's discretion. But more
17 importantly in State vs. Weik, W-E-I-K, a 2002
18 case, contained in the citation for which 587,
19 S.E. 2d., 683, the court held that where there is
20 a dispute as whether a defendant is competent to
21 stand trial, the defendant bears the burden of
22 proving his lack of competency by a preponderance
23 of the evidence.

24 Furthermore, Section 17-24-10(B),
25 establishes the burden of proof or lack of

1 criminal responsibility as being by a
2 preponderance of the evidence. And again, it is
3 on the -- the burden is on the defendant. The
4 evidence in this case is, the only evidence in
5 this case is that the defendant did, or is or was
6 competent to stand trial, or by virtue of the
7 Department of Mental Health Report. No proof has
8 been offered in the court regarding the criminal
9 responsibility issue. And I think that at this
10 late stage it should have been brought up long
11 before now of criminal responsibility if that was
12 the case.

13 It's simply a failure of prove to show the
14 necessity of further evaluation. The motion for
15 funds is denied. Thank you.

16 -----End of Requested Transcript of Record-----

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Certificate

I, Margaret T. Sullivan, Court Reporter, for the Third Judicial Circuit of the State of South Carolina, do hereby Certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the above captioned case, relative to appeal, in General Sessions Court, July 7, 2009, in Sumter County, Sumter, South Carolina.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

1/23/09
DATE

Margaret T. Sullivan
COURT REPORTER

My Commission expires: 10-11-03

COPY

200910069

ap

SCDMH South Carolina Department of Mental Health



South Carolina
Department of
Mental Health

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Date: 6/16/09

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Please see the attached CST report for Marco Clark.

Thank you.

Cc: Harry Devoe, Atty. 803-473-2028

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12

DMH South Carolina
Department of
Mental Health

Division of Inpatient Services
Forensic Evaluation and Treatment Services
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Fax: (803) 935-5811

June 15, 2009

Amy Land
Assistant Solicitor
PO Box 70
Manning, SC 29102

Re: The State of South Carolina vs. Clark, Marco A.
DMH Case #: 202-4612
Clarendon County, Court of General Sessions

Dear Assistant Solicitor Land:

In accordance with the court order issued by the Honorable R. Ferrell Cothran, Jr., a competency to stand trial evaluation was conducted by the South Carolina Department of Mental Health, pursuant to S.C. Code Ann. § 44-23-410 (1976).

Please see the attached report for the results of this evaluation.

This 9 page document is certified to be the original court-ordered evaluation report issued pursuant to S.C. Code Ann. § 44-23-410 (1976).

6-16-09
Date

Barbara A. Christensen
Barbara A. Christensen, LISW-CRS
Program Coordinator
Forensic Evaluation Services
Department of Mental Health

cc: Harry Devoe, Attorney at Law, 7411 Black River Road, New Zion, SC 29111

BAC/tl

Report on Competency to Stand Trial

Name: Clark, Marco

Date of Birth (Age): (26)

Date of Interview: 06/03/2009

Date of Report: 06/12/2009

Examiners: Michael D. Gassen, Psy.D. (presiding)
D. Tia Taylor, LMSW

Opinion on Competency to Stand Trial: Competent

Referral Information

Mr. Clark is a 26-year-old African-American male who is charged with Armed Robbery and Possession of a Weapon During Violent Crime. The State of South Carolina, County of Clarendon, Court of General Sessions issued an order to evaluate his competency to stand trial. Pursuant to this order, Mr. Clark was evaluated on 06/03/2009 at the Forensic Evaluation Service of the South Carolina Department of Mental Health (SCDMH). At the time of the evaluation, Mr. Clark was detained at the Clarendon County Detention Center, and he was returned to that facility following the evaluation.

Notification

Prior to the interview, Mr. Clark was advised that the results and contents of this evaluation would be used to evaluate his competency to proceed, and would therefore be communicated to the defense counsel, the solicitor, and the judge. He displayed comprehension of the nature and purpose of the evaluation as well as the limitations to confidentiality, signed a form that explains these issues, and agreed to proceed with the evaluation.

Sources of Information

- State of South Carolina, County of Clarendon, Court of General Sessions order for competency to stand trial evaluation.
- Clarendon County Arrest Warrants for the alleged offenses
- Clarendon County Sheriff's Department records for the alleged offenses
- Records from Morris Village Alcohol & Drug Addiction Treatment Center (from 08/06/2004 to 08/25/2004)
- Records from G. Werber Bryan Psychiatric Hospital (BPH; from 08/05/2003 to 05/13/2005)
- Records from the South Carolina Department of Mental Health Forensic Evaluation Service (from 07/13/2006 to 10/12/2006)
- Records from Just Care (from 08/17/2006 to 10/17/2006)
- Records from Three Rivers Center for Behavioral Health (from 11/19/2008 to 12/02/2008)
- Records from Clarendon County Mental Health Center (from 12/11/2008 to 04/06/2009)

- Records from Clarendon County Detention Center (from 12/04/2008 to 05/13/2009)
- A Psychiatric Social Work Admission Assessment completed by D. Tia Taylor, LMSW, with information provided by Bobby Clark and Gussie Mae Clark (dated 06/01/2009)
- Clinical/Forensic interview of Mr. Clark on 06/03/2009 (approximately 2.0 hours)

Background Information

Family History

Mr. Clark reported he was born in Columbia, SC, and was raised by his grandmother and later by his mother. He stated he got a long "just fine" with his grandmother. He denied a history of abuse, but he indicated he observed domestic violence between his mother and her boyfriend a "couple times." He reported one of his immediate family members has bipolar disorder or schizophrenia, but he denied a family history of substance abuse or legal problems.

Mr. Clark reported he is single and has never fathered any children. He also denied a history of romantic relationships. He said that, at the time of his arrest, he was living "with my momma sometimes but sometimes I be with a friend."

Educational History

Mr. Clark reported he graduated from high school and completed part of a semester at "Midlands Tech." He said he did not complete the semester because "my life turned around...introduced to a whole another world...drugs, corruption, thieving." When asked to describe his performance in school, he said, "Probably a D student...just barely passing." He initially denied a history of special education classes, but he later said he was in "developmental classes" for a brief period during the 2nd grade. He identified his behavior problems at school as fighting, skipping classes, and disrespecting teachers. He said he was suspended once in the fifth grade and once in high school.

Employment History

Mr. Clark reported he has been employed as a dishwasher, assembly line worker, and as a carpenter. He said his longest period of employment was for five months at "a plant that made lawnmowers." He denied ever being terminated from a position. Mr. Clark reported he receives Social Security Income. When asked why he receives those benefits, he said, "Don't know exact reason...told me I'm paranoid schizophrenic."

Military History

Mr. Clark said he served one year in the Navy. He said he received some disciplinary actions due to "not coming to work" and "talking back to the people." He stated he received an "other than honorable" discharge.

Medical History

Mr. Clark denied ever having a seizure, being diagnosed with diabetes, or any thyroid problems. He said, however, that he sustained a head injury in the 6th grade when he fell while running and hit his head on the concrete. Although he reported he "might have been unconscious for a minute," he said he subsequently saw a doctor and was told there were no problems.

Substance Use History

Mr. Clark reported he first consumed alcohol at age six, and he said he typically drinks two 12-ounce beers per day, five days per week. He stated he last drank "six months ago." Regarding illicit substances, he stated he first used marijuana in 2000 and used it "five to six days out of the week." He acknowledged that using marijuana "probably does make me paranoid after a time." However, he did not report any other difficulties arising from his marijuana use. He said he last used that substance "six months ago." Mr. Clark stated he has been using cocaine "two times a week when I can afford it," and he acknowledged having heart problems "because of that." He said he last used it "six months ago." He also reported he began using crack cocaine in 2004 and has used it "every day for the most part." On questioning, he acknowledged developing a tolerance to that substance, becoming paranoid when he uses it, and having to "do things...to get that one more [that] might be wrong." He said he last used crack cocaine six months ago. No other history of illicit substance use was reported, and he denied a history of huffing a substance or abusing medications. Mr. Clark reported he has received substance abuse treatment at Morris Village and in a program at Three Rivers Hospital.

According to records from Morris Village Alcohol & Drug Addiction Treatment Center (from 08/06/2004 to 08/25/2004), Mr. Clark was admitted to that facility for substance abuse treatment. He reported a history of using alcohol, marijuana, crack cocaine, and "cocaine powder" daily, and he indicated he had been stealing from his family members and threatened them "during the extensive use of chemicals." Records indicate that he was placed on a "Dual Unit" at that facility earlier that year, and began to display psychotic symptoms. As such, it was noted, "Now it is apparent that he suffers from primary psychotic illness." He was prescribed antipsychotic. In addition, during treatment groups, he sometimes "seemed to be smiling to himself with some question as to whether he was responding to internal stimuli." On discharge, he was diagnosed with schizophrenia, paranoid type; "crack dependence;" alcohol dependence; marijuana dependence; and personality disorder not otherwise specified (NOS) with antisocial traits.

Mental Health History

Mr. Clark reported he has received inpatient mental health treatment at G. Werber Bryan Psychiatric Hospital and Three Rivers Hospital, and he said he has received outpatient mental health treatment at Holly Hill. He said his inpatient admissions were due to feeling as though he was in "another realm" and his grandmother saying "I needed help." He said he was diagnosed with schizoaffective disorder on one occasion. Mr. Clark reported he is currently prescribed Prozac and Zyprexa, and he stated he has taken Geodon, Haldol, Lithium, Prolixin, Risperdal, and Abilify in the past.

According to records from G. Werber Bryan Psychiatric Hospital (BPH; from 08/05/2003 to 08/15/2003), Mr. Clark was admitted to that facility due to "using cocaine and marijuana and alcohol, displaying odd paranoid behavior." Prior to that admission, he had displayed odd behaviors, was socially withdrawn, voiced delusions, had an increase in energy, and had poor hygiene. On a mental status examination on admission, no disorganized thought processes were observed, his motor activity was normal, but his mood was described as "anxious." He also was considered to be "paranoid," but this reportedly "decreased on medication." On discharge, he was diagnosed with psychotic disorder NOS, marijuana abuse, and cocaine abuse.

Records from BPH (from 06/06/2004 to 08/06/2004) indicate Mr. Clark was transferred to that facility from Morris Village after he "developed increased psychosis with looseness of associations and was...paranoid and...hostile and threatening." On admission to BPH, he continued to display disorganized thought processes, and he appeared guarded and voiced homicidal ideation. During that admission, he displayed "blunted" affect (i.e., observed emotional expression), voiced beliefs about receiving messages from the television, and said he felt as though "Jimmy Hendrix does things to him through his music." After being prescribed an antipsychotic medication, his symptoms improved, and he displayed some insight into his psychotic symptoms. On discharge, he was diagnosed with schizophrenia, paranoid type; marijuana abuse; alcohol abuse; and cocaine abuse.

According to records from BPH (from 05/05/2005 to 05/13/2005), Mr. Clark was admitted to that facility from the emergency room on emergency papers after not taking his medications, "some behavioral problems," and "use of marijuana and cocaine." At the emergency room, he reportedly displayed "a lot of psychomotor agitation," disorganized speech, and "hyperreligious" thoughts. During that admission to BPH, he initially continued to display those symptoms along with rapid speech. He was prescribed antipsychotic medications, and he eventually was considered "nicely stable, in good spirits, and cooperative." On discharge, he was diagnosed with schizophrenia, paranoid type; cocaine dependence; marijuana dependence; and alcohol abuse.

Records from the South Carolina Department of Mental Health Forensic Evaluation Service indicate Mr. Clark was evaluated by Jeff Musick, Ph.D., ABPP (on 07/13/2006) regarding his competency to stand trial. At the time of that evaluation, Mr. Clark presented with poor hygiene, rapid and overly inclusive speech, disorganized thought processes, and a restricted range of emotional expression. He also voiced beliefs about "others...trying to read his mind" and having a "third eye" that gives him the ability to investigate things that are "unseen." Mr. Clark was diagnosed with schizophrenia, undifferentiated type; cocaine dependence; and cannabis dependence. It was opined that he was not competent to stand trial at that time.

According to records from Just Care (from 08/17/2006 to 10/17/2006), Mr. Clark was admitted to that facility "on emergency papers...after becoming mute in jail and refusing to take medications." He also reportedly had flat affect, was experiencing auditory hallucinations, was considered suicidal, and engaged in bizarre behavior. On admission, he appeared "unkempt," displayed some response latency, endorsed experiencing auditory hallucinations, and his affect was described as "blunted." While he initially reported hearing voices, his symptoms improved after he was prescribed psychotropic medications. On discharge, he was diagnosed with

schizophrenia, paranoid type; crack cocaine dependence, in a controlled environment; cannabis abuse; and alcohol abuse.

Records from the South Carolina Department of Mental Health Forensic Evaluation Service indicate that Mr. Clark was reevaluated by Jeff Musick, Ph.D., ABPP, (on 10/12/2006) regarding his competency to stand trial. During that evaluation, Mr. Clark "displayed virtually no emotion," said he had been "feeling "happy for myself," and he reported he had experienced auditory hallucination four weeks before that evaluation. He did not voice any delusions, but he displayed some response latency. Mr. Clark was diagnosed with schizophrenia, undifferentiated type; cocaine dependence, and cannabis dependence. It was opined that he was competent to stand trial at that time.

According to records from Three Rivers Center for Behavioral Health (from 11/19/2008 to 12/02/2008), Mr. Clark was admitted to that facility due to "psychosis," being considered a "danger to self and others," and having an "inability to meet basic life and health needs." Prior to that admission, he reported hearing voices "telling him to commit a crime." It was noted that he had been "using cocaine, marijuana and alcohol." During that admission, he was prescribed antipsychotic and mood stabilization medications, and he subsequently displayed an improvement in symptoms and was discharged. On discharge, he was diagnosed with schizophrenia, paranoid type; cocaine dependence; and alcohol dependence."

Records from Clarendon County Mental Health Center (from 12/11/2008 to 04/06/2009) indicate Mr. Clark has been prescribed an antipsychotic and an antidepressant medication during his current detention for reported hallucinations, depressive symptoms, and voicing delusional and/or paranoid beliefs. He also has presented with flat affect, slow speech, racing thoughts, and concentration difficulties. He has been diagnosed with schizophrenia, paranoid type.

Legal History

Mr. Clark reported he has been arrested on approximately 11 to 12 occasions for Common Law Robbery, Shoplifting, and Robbery. He said he has been on probation once in the past, but he denied ever serving a prison sentence.

Records from Clarendon County Detention Center (from 12/04/2008 to 05/13/2009) reveal that Mr. Clark has reported experiencing auditory hallucinations during his current detention and has presented with flat affect. He has been prescribed an antipsychotic and an antidepressant medication.

Current Presentation

Mr. Clark is a 26-year-old African-American male of above average height and medium build who appears his stated age. He presented for the interview in correctional garb and shackles. His grooming and hygiene were adequate, and no physical abnormalities were observed. No oddities in posture or movement were noted. Mr. Clark was alert and attentive throughout the interview, and he offered a normal amount of eye contact. His speech was of normal rate, rhythm, and volume, and no difficulties in articulation or other language disturbances were noted. On questioning, Mr. Clark accurately stated his name, his location, and the date. He also

understood that he was here because "my lawyer" and the "judge" said he needed "to be evaluated." He repeated a list of three words, and he recalled two of the words after approximately five minutes had elapsed. His ability to recall events from his recent and remote past appeared intact. On questioning, he named five big cities and listed the U.S. presidents from the current president back to George Bush, Sr. correctly. Based on his explanations of common proverbs and responses to questions about classifying similar objects, his capacity for abstract thinking appeared fairly good. His judgment seemed to be adequate as well. His intellectual functioning appeared to be in the average range. He described his mood as "pretty good," and his affect (i.e., observed emotional expression) was generally normal and consistent with the content of his speech. His thought processes appeared generally clear and coherent, but, at times, he discussed odd beliefs and became tangential (i.e., discussed issues obliquely related to the topic). When asked about hallucinations, he said he hears a voice at times that tells him things about himself (e.g., "I'm too good to be true"). Mr. Clark did not appear to be experiencing or responding to internal stimuli during the interview. He also reported a number of delusions (i.e., false, fixed, firmly held beliefs). For example, he said he believes the voice he hears is "like a... sixth sense, a third eye" that tells him "things that help me." He added that, as a result of this information that he receives, he is "more alert when he's with me." When asked about beliefs he has voiced in the past regarding receiving messages from the television or music, he said he is "past that" and "don't need that no more," as he can "learn everything I need to know on my own." On questioning about his special powers, he said, "I'm kind of super... I'm patient... can control what I'm doing if I hold one. I practice a lot and that's perfect in itself." He denied any current suicidal or homicidal ideation or intent.

Diagnostic Impressions

Mr. Clark reported a history of experiencing auditory hallucinations, and he voiced some delusions during the interview. His thought processes also appeared disorganized at times, but he was able to be redirected to the topic under discussion. His records indicate he has a history of disorganized thought processes, bizarre behaviors, delusional beliefs, flat affect, and reporting auditory hallucinations. These symptoms have occurred at times when he ostensibly did not have access to illicit substances. Given this information, it appears a diagnosis of schizophrenia, undifferentiated type, is warranted at this time. This subtype of schizophrenia is appropriate when an individual has displayed symptoms consistent with schizophrenia but do not meet the criteria for any other specific subtype (e.g., paranoid).

Mr. Clark appeared to openly discuss his history of substance abuse, but some of the information was inconsistent with his records. For example, although his records document a lengthy history abusing alcohol, he denied drinking more than two beers per day. He acknowledged, however, that he has used cocaine and crack cocaine regularly, and he indicated he has had health problems related to cocaine use and developed a tolerance to the crack cocaine. He also indicated he has engaged in illegal activities in order to obtain crack cocaine. This is consistent with his previous diagnosis of cocaine dependence, and this diagnosis therefore appears appropriate at this time. He may meet the criteria for other substance-related diagnosis, but the inconsistencies between his report and records preclude making an accurate diagnosis at this time.

Competency to Stand Trial

A determination of whether Mr. Clark is competent to stand trial is within the domain of the Court. Nonetheless, it is the opinion of the undersigned that, although appeared to have some residual symptoms of schizophrenia, those symptoms did not appear to adversely impact his capacity to understand the proceedings against him and assist his attorney in his own defense.

Mr. Clark demonstrated a basic understanding of being charged with a crime; the difference between felonies and misdemeanors; the meaning of guilty, not guilty, and not guilty by reason of insanity (NGRI); being placed on probation; the use of evidence in the courtroom; and the roles of the judge, jury, defense attorney, solicitor, and witnesses. For example, he said NGRI means, "Didn't know what they was doing at the time of the crime." When asked what could cause that to occur, he responded, "Drugs, mental illness." In addition, he said the judge "oversees the court" and "determine[s] whether you guilty or how much time you get." Mr. Clark did not appear to fully understand no contest, the plea bargain process, or perjury; however, these issues were explained to him, and, at the end of the interview, he recalled the information that had been provided to him. For example, at the end of the interview, he defined no contest as, "I ain't saying whether I want to do anything or not." When asked if the person would be admitting to the crime, he responded, "No," and he added, "Not denying it either." He said that a judge would usually treat a no contest plea "as a guilty" plea.

Regarding his current legal situation, Mr. Clark stated he is charged with "Armed Robbery" and "a weapon charge." On questioning, he defined Armed Robbery as, "Robbed somebody with a weapon." When asked what Possession of a Weapon during a Violent Crime means, he responded, "Had a weapon." Mr. Clark stated that the events that led to these charges occurred "six months ago" in Santee, SC. He stated his charges are "supposed to be serious," and he said he could serve "up to 35 years" in prison if he is convicted. He said he would be sent to "Just Care" if he were found NGRI. On questioning, he identified evidence that could be used against him at trial, and he said he could ask "my lawyer" about evidence he could use in his defense. Upon inquiry about the likelihood of being convicted, he said he believes it was "very likely" because the "ball ain't in my favor...got a co-defendant who'll probably testify against me...and the girl."

Regarding his ability to assist in his defense, Mr. Clark stated his attorney is Harvey Devoe. He reported he can "write him a letter" if he needs to contact him. When asked to describe his attorney, he said, "He's forgetful...other than that he alright." Upon inquiry about whether he has confidence in his attorney, he responded, "A little bit...he's a public defender...can only do so much." He indicated he believes his attorney is trying to do a good job from him, and he said his mother and grandmother have been assisting with the case. He initially said he would "fire" his attorney if they had a disagreement; however, when asked what he should do first, he stated, "Try to talk it out...come to a solution." On questioning, Mr. Clark provided a clear, coherent, and moderately detailed account of the events that led up to and occurred at the time of the alleged offenses. He stated he probably would not want to testify at a trial because he "might say the wrong thing." When asked if he would change his mind if testifying were encouraged by his attorney, he said, "I guess I would...[because] it could help me." Upon inquiry about how he would react if a witness told a lie about him in court, he stated, "Say something...[to] the lawyer." Although Mr. Clark voiced delusional beliefs during the interview, he did not relate

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them to his charges, legal situation, or attorney during the competency interview. Despite asking about those beliefs again at the end of the competency interview and their possible relevance to his case, he did not voice any delusions about his legal situation or attorney.

In summary, although it appears that Mr. Clark has some residual psychotic symptoms, he did not display any symptoms at the time of the interview that would interfere with his capacities to understand the proceedings against him or to assist his attorney in his own defense. Indeed, he demonstrated an understanding of most of the general legal and case-specific information that was discussed, and he displayed an ability to readily learn and retain information he appeared to be lacking. He also indicated he would be able to work with his attorney in his defense, and he demonstrated the capacity to interact with others appropriately. Despite voicing delusional beliefs during a mental status examination, he did not relate these beliefs to his case or legal situation during the interview, and, when explicitly asked if they were relevant to his case, he responded, "No." As such, it appears that Mr. Clark currently has the capacity to understand the proceedings against him and to assist his attorney in his own defense.

Recommendations

Although Mr. Clark did not voice any delusions about his case or attorney during the interview, it is possible that he could develop delusions about his legal situation or attorney as things move forward with his case. Thus, it is recommended that the Court be attentive to statements he may make that would suggest he has become delusional about his attorney or legal situation.

Michael Gassen, Psy.D. 6/12/09
 Michael Gassen, Psy.D. Date
 Chief Psychologist

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Clarendon County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARCO ANDREA CLARK,

APPELLANT

FINAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
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Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to approve funds for the defense to hire an expert to determine if Clark lacked the capacity to distinguish moral or legal right from moral or legal wrong at the time of the crime, when the defense presented evidence that a competency evaluation revealed a long history of mental health issues including a diagnosis of schizophrenia, a prior finding that Clark was not competent to stand trial, and a history of experiencing auditory hallucinations and delusional behaviors and beliefs?

STATEMENT OF THE CASE

In March of 2009, the Clarendon County Grand Jury indicted Clark in a two count indictment for armed robbery and possession of a weapon during the commission of a violent crime, indictment #2009-GS-14-0069. On July 7, 2009, Clark appeared before the Honorable Howard P. King and pled guilty as charged. Judge King sentenced Clark to 22 years for armed robbery and 5 years concurrent for possession of a weapon during the commission of a violent crime. A timely notice of intent to appeal was filed on July 15, 2009. In letters dated July 31, 2009 and September 3, 2000 [sic](2009), plea counsel provided an explanation pursuant to Rule 203 (d)(1)(B) SCACR as to why the appeal of the guilty plea should be allowed. (R. pp. 59-60). This appeal follows.

ARGUMENT

The trial judge erred in refusing to approve funds for the defense to hire an expert to determine if Clark lacked the capacity to distinguish moral or legal right from moral or legal wrong at the time of the crime, when the defense presented evidence that a competency evaluation revealed a long history of mental health issues including a diagnosis schizophrenia, a prior finding that Clark was not competent to stand trial, and a history of experiencing auditory hallucinations and delusional behaviors and beliefs.

On July 7, 2009, counsel for Clark asked the trial judge to approve funds to hire an expert to determine competency to stand trial and criminal responsibility. (R. p. 58). Previously, on May 14, 2009, the Honorable R. Ferrell Cothran, Jr, signed an order for a competency evaluation. (R. p. 41-46). The reason given for issuance of the order is, 'Unable to properly communicate with counsel in order to prepare a proper defense.' (R. p. 41). Pursuant to that order, the South Carolina Department of Mental Health [Department] evaluated Clark for competency only and not for criminal responsibility. The Department found him competent to stand trial. The report was admitted as a court's exhibit. (Hearing R. p. 3, lines 14 -21; R. p. 48).

During the hearing on the motion for funds, the judge stated, "The date of the interview was 6/3/09 and the date of the report is 6/12/09 is what I see. And I haven't quite finished. Let me just finish reading. All right. Mr. Devoe [defense counsel], I've had a chance to review the report of the Department of Mental Health. It appears to me that he was before the Department of Mental Health only on the issue of competency to stand trial. Not both criminal responsibility and competency to stand trial. Is that correct?" (Hearing tr. p. 3, lines 5-10). Plea counsel acknowledged that the evaluation was only for competency and then later stated, "I think perhaps I made a mistake in asking just for the competency to stand trial versus criminal responsibility." (R. p. 3, lines 11- 13; p. 5, lines 7-9). The judge then asked defense counsel why he had not requested an evaluation to determine criminal responsibility at the same time he requested the competency evaluation. Defense counsel

responded, "I frankly thought I had, and I didn't. But the one that was signed is the one that prepared my request. And I guess, I can't explain why I didn't. I normally would have, and I can't understand why it was not done in this case. (R. p. 6, lines 9-14).

The judge then denied the motion for funds writing:

Furthermore, Section 17-24-10(B), establishes the burden of proof or lack of criminal responsibility as being a preponderance of the evidence. And again, it is on the - - burden is on the defendant. The evidence in this case is that the defendant did or is or was competent to stand trial, or by virtue of the Department of Mental Health Report. No proof has been offered regarding the criminal responsibility issue. And I think that at this late stage it should have been brought up long before now of criminal responsibility if that was the case. It's simply a failure of prove [sic] to show the necessity of further evaluation. The motion for funds is denied. Thank you.

(R. p. 8, lines 24 – p. 9, lines 1-15). The judge erred in refusing to approve funds for an evaluation to determine criminal responsibility.

After the judge denied funding for the evaluation to determine criminal responsibility, Clark pled guilty. During the guilty plea Clark told the judge he had been to mental health counseling for schizophrenia. (R. p. 5, lines 15- 22). The judge stated, "I would go on to say that in this case, I am aware of some mental health issues in the past from having read the report of the South Carolina Department of Mental Health. But according to what I read, I believe that he was responsible at the time he committed this crime. Did know the difference between right and wrong, based upon my observations of his answers to these questions." (R. p. 19, lines 2-10). The incident took place in December of 2008, and the plea took place in July of 2009. The report from the Department of Mental Health, however, did not address criminal responsibility at the time of the incident.

Defense counsel informed the court of the numerous times Clark had been treated for mental health issues, as reflected in the report. (R. p. 19, lines 19-25). He also

informed the court that the incident took place one day after Clark had been released from a behavioral health center where he was being treated for mental health issues. (R. p. 19, lines 19-25). Defense counsel informed the court that Clark's family had mental health issues. (R. p. 21, lines 2-12). Both Clark's mother and grandmother testified at the guilty plea hearing that Clark was mentally ill. (R., pp. 23 – 26).

The report from the Department finds:

Mr. Clark reported a history of experiencing auditory hallucinations, and he voiced some delusions during the interview. His thought processes also appeared disorganized at times, but he was able to be redirected to the topic under discussion. His records indicate he has a history of disorganized thought processes, bizarre behaviors, delusional beliefs, flat affect, and reporting auditory hallucinations. These symptoms have occurred at times when he ostensibly did not have access to illicit substances. Given this information, it appears that a diagnosis of schizophrenia, undifferentiated type, is warranted at this time. This subtype of schizophrenia is appropriate when an individual has displayed symptoms consistent with schizophrenia but do not meet the criteria for any other specific subtype (e.g. paranoid).

(R. p. 55). The report also finds that Clark had previously been found not competent to stand trial in July of 2006, three years earlier. The judge failed to consider any of this information from the report in denying the request for funds for an evaluation to determine criminal responsibility. There was sufficient evidence to warrant the granting of the motion for funds to have Clark evaluated for criminal responsibility.

The M'Naughten test is the standard for determining whether a defendant's mental condition at the time of the offense rendered him criminally responsible. S.C. Code §17-24-10 provides, "It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.

The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.” “An accused who lacks the capacity to distinguish moral or legal right from moral or legal wrong at the time of the crime is relieved of responsibility for his acts.” State v. Law, 270 S.C. 664, 667, 244 S.E.2d 302, 304 (1978). “This is the McNaughten insanity defense defined in S.C. Code 17-24-10.” Davenport v. State, 301 S.C. 39, 39, 389 S.E. 2d 649, 649 (1990).

S.C. Code §17-24-20 provides, “A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law. To return a verdict of “guilty but mentally ill” the burden of proof is upon the State to prove beyond a reasonable doubt to the trier of fact that the defendant committed the crime, and the burden of proof is upon the defendant to prove by a preponderance of evidence that when he committed the crime he was mentally ill.”

The ordering of a competency examination is within the discretion of the trial judge. State v. Drayton, 270 S.C. 582, 584, 243 S.E.2d 458, 459 (1978); State v. Singleton, 322 S.C. 480, 483, 472 S.E.2d 640, 642 (Ct. App. 1996). The refusal to grant such an examination will not be disturbed on appeal absent a clear showing of an abuse of that discretion. Drayton, 270 S.C., at 584, 243 S.E.2d at 459; State v. Buchanan, 302 S.C. 83, 85, 394 S.E.2d 1, 2 (Ct. App. 1990). “This is so, because the determination of whether there is ‘reason to believe’ a defendant lacks a certain mental capacity necessarily requires the exercise of discretion.” State v. White, 364 S.C. 143, 147-48, 611 S.E.2d 927, 929 (Ct. App. 2005) (citing and quoting State v. Bradshaw, 269 S.C. 642, 644, 239 S.E.2d 652, 653 (1977)). An abuse of discretion occurs when the conclusions of

the trial court either lack evidentiary support or are controlled by an error of law. State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001); State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249-50 (Ct. App. 2006).

In the present case, the judge's finding that Clark failed to show the necessity of an evaluation for criminal responsibility is simply not supported by the record which demonstrates a long history of mental health issues. The only reason Clark was not evaluated for criminal responsibility at the time he was evaluated for competency was due to an oversight by defense counsel. The competency report was sent via fax to defense counsel on June 16, 2009, a little over two weeks before defense counsel made the request for the evaluation for criminal responsibility.

The case is distinguished from State v. Colden, 372 S.C. 428, 641 S.E.2d 912 (Ct.App. 2007) and State v. Burgess, 356 S.C. 572, 590 S.E.2d 42 (Ct.App. 2003). In Colden the South Carolina Court of Appeals found no abuse of discretion when the trial judge refused to order a competency evaluation because "[t]here was no evidence of irrational behavior before or during the trial, nor prior medical opinion concerning competency as to require an evaluation under the Burgess factors." 372 S.C. at 442, 641 S.E.2d at 920 citing State v. Burgess, 356 S.C. 572, 590 S.E.2d 42 (Ct. App. 2003). In State v. Burgess, the Court of Appeals identified three factors to be considered in determining whether further inquiry into a defendants' fitness to stand trial was warranted. These are: (1) evidence of irrational behavior; (2) demeanor at trial; and (3) prior medical opinion regarding ability to stand trial. In some instances, the presence of just one of the factors may justify further inquiry requiring a mental evaluation. In Burgess counsel offered nothing to demonstrate that Burgess's mental retardation was such as to render her unfit for trial.

In Clark's case there was a history of irrational behavior, a history of mental

health issues including a diagnosis of schizophrenia and a prior finding that Clark was not competent to stand trial. While both Colden and Burgess involved evaluations for competency to stand trial rather than for criminal responsibility, Clark meets the Burgess factors requiring an evaluation for criminal responsibility.

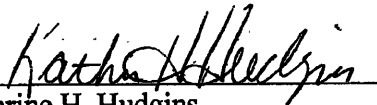
In regard to competency to stand trial, S.C. Code §44-23-410 requires a judge to order a competency evaluation if the judge has reason to believe that a person on trial before him, charged with the commission of a criminal offense or civil contempt, is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity. In regard to criminal responsibility, S.C. Code §§ 17-24-10, 20 provide the defendant must prove, at trial, by a preponderance of the evidence that he was insane or guilty but mentally ill. These code sections do not appear to address the standard of proof in regard to ordering an evaluation for criminal responsibility as S.C. Code § 44-23-410 sets for evaluations for competency.

The judge found that the burden of proof to order the evaluation for criminal responsibility was preponderance of the evidence. (Hearing tr. p. 8, lines 24 – p. 9, lines 1-15). If the standard is preponderance of the evidence rather than simply “a reason to believe” the defendant may not be criminally responsible, Clark still meets the greater burden and meets the factors in Burgess requiring an evaluation. The judge’s refusal to authorize funds for an evaluation for criminal responsibility constitutes an abuse of discretion requiring reversal of the conviction and remand for an evaluation for criminal responsibility.

CONCLUSION

Based on the above argument, Clark's conviction and sentence should be reversed and the case remanded for an evaluation for criminal responsibility.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

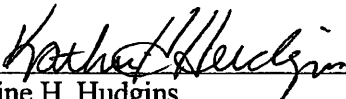
ATTORNEY FOR APPELLANT

This 5th day of May, 2011.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 5, 2011



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Clarendon County
Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

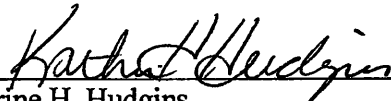
V.

MARCO ANDREA CLARK,

APPELLANT

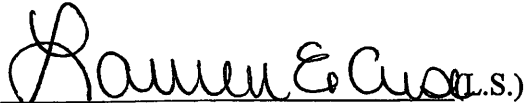
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark Farthing, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201 this 5th day of May, 2011.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of May, 2011.


Notary Public for South Carolina

My Commission Expires: August 23, 2014 .

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Marco Andrea Clark, Appellant.

Appeal From Clarendon County
Howard P. King, Circuit Court Judge

Unpublished Opinion No. 2012-UP-055
Submitted January 3, 2012 – Filed February 1, 2012

AFFIRMED

Appellate Defender Kathrine H. Hudgins, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General William M. Blitch, Jr., all of Columbia; and Solicitor Ernest A. Finney, III, of Sumter, for Respondent.

PER CURIAM: Marco Andrea Clark appeals his convictions for armed robbery and possession of a weapon during the commission of a violent crime. He argues the trial court erred in denying his motion for funds to hire an expert to determine whether Clark lacked the capacity to distinguish moral or legal right from moral or legal wrong at the time of the crime. We affirm [1] pursuant to Rule 220(b)(1), SCACR, and the following authorities: Rivers v. Strickland, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975) ("The general rule is that a plea of guilty, voluntarily and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea.").

AFFIRMED.

SHORT, WILLIAMS, and GEATHERS, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.