IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	**NO. 133, 134 CR 08**
	:	
RALPH E. FAHRINGER,	:	
Defendant	:	

Joseph J. Matika, Esquire — **Counsel for Commonwealth**
Asst. District Attorney
Gregory L. Mousseau, Esquire — **Counsel for Defendant**

Nanovic, P.J. – May 13, 2011

MEMORANDUM OPINION

The Defendant, Ralph Fahringer, a thirty-two-year-old man accused of having intercourse with a fourteen-year-old minor girl, claims he is incompetent to stand trial pursuant to Section 402 (a) of the Mental Health Procedures Act, 50 P.S. § 7402(a). Specifically, Defendant claims he does not have the mental capacity to understand the nature and object of the proceedings against him, and to participate and assist in his defense. For the reasons which follow, we agree and order a further evaluation by a court-appointed psychiatrist.

FACTUAL AND PROCEDURAL BACKGROUND

Between December 26, 2007, and January 9, 2008, Defendant is charged with engaging in sexual intercourse with a fourteen-year-old female on six separate occasions. The

relationship was allegedly consensual. The victim was a knee-high cheerleader coached by Defendant's wife and who also helped in watching Defendant's two children, ages five and seven.

Previously, on December 7, 1998, Defendant sustained head injuries in a head-on collision with another vehicle. These injuries were initially believed to consist primarily of severe facial lacerations and a broken nose. Although no cognitive deficits were noted at the time, shortly after the accident Defendant began experiencing severe headaches with increasing difficulty concentrating and functioning. Nevertheless, following the accident Defendant returned to work and began dating his future wife, whom he married on February 14, 2000. Defendant ceased working in 2002. This same year he was awarded social security disability benefits. At the time, he was diagnosed with post-concussion syndrome, organic brain syndrome, and major depressive disorder due to a serious motor vehicle accident.

Defendant was prescribed medication which alleviated, to some extent, the problems he experienced after the accident. Unfortunately, Defendant was involved in a second motor vehicle accident in August, 2007, following which he stopped taking the medication previously prescribed. Defendant, who was then unemployed and spent most of his time at home, was not using this medication at the time of the crimes charged. He exhibited

difficulty concentrating, performing simple tasks, and appeared to have little insight or understanding of the consequences of his actions. In addition, both Defendant's remote and recent memory were in question: he appeared to have little recollection of significant events in his life, and his working memory was impaired.

Nevertheless, the extent to which these difficulties actually affected Defendant's ability to meet the demands of every day living and to deal with his basic needs is unclear. An individual with borderline intellectual functioning is not automatically incapable of comprehending and making rational decisions. For example, the evidence indicates Defendant was able to drive a motor vehicle and served as an assistant coach for young children playing flag football.

Moreover, Defendant's complaints are primarily subjective. The extent of Defendant's closed head injury has never been documented by imaging studies or other objective measures. A CAT Scan of Defendant's head taken in 1998 to evaluate the injuries he sustained in the motor vehicle accident that year was normal. Additionally, other than minimal inflammatory changes in the left maxillary and right anterior ethmoid air cells, an MRI of Defendant's brain taken on March 16, 2002, was also normal.

Defendant's conduct was first reported to the police by the minor and her mother in mid-January 2008. In separate statements given by Defendant to both the Mahoning Township and Lehighton Police, Defendant admitted to having oral and vaginal intercourse with the minor, and being aware of her age. Two police departments were involved since four of the alleged incidents occurred at Defendant's home in Mahoning Township and two at the victim's home in Lehighton. Charges were filed on February 4 and February 11, 2008, respectively.[1]

On July 7, 2008, Defendant filed notice of a defense of insanity or mental infirmity pursuant to Pa.R.Crim.P. 568. Therein, Defendant contends that at the time of the incidents he could not distinguish between right and wrong, and that he did not and could not comprehend the criminality of his actions due to mental disease or infirmity. On May 26, 2010, Defendant filed a petition under the Mental Health Procedures Act, 50 P.S. §§ 7101-7503, for a hearing to determine his competency to stand trial. In this petition, Defendant alleges that he "is not mentally competent to proceed, does not know the functions of the principal participants in the courtroom and does not have

[1] **For each incident, Defendant has been charged with one count of involuntary deviate sexual intercourse with a person less than sixteen years of age, 18 Pa.C.S.A. § 3123(a)(7); one count of statutory sexual assault, 18 Pa.C.S.A. § 3122.1; one count of aggravated indecent assault of a person less than sixteen years of age, 18 Pa.C.S.A. § 3125(a)(8); and one count of indecent assault of a person less than sixteen years of age, 18 Pa.C.S.A. § 3126(a)(8). In addition, for the incidents alleged to have occurred in Mahoning Township and for each of the incidents in Lehighton, Defendant has been charged with corruption of minors, 18 Pa.C.S.A. § 6301(a)(1).**

the ability to work rationally with his attorney in preparing his defense." (Petition to Determine Competency, Paragraph 6). After numerous continuances, a hearing on this petition was held on April 7, 2011.

At the April 7, 2011 hearing, Dr. Frank M. Dattilio, a clinical and forensic psychologist, testified that he had reviewed Defendant's medical records, conducted a number of psychological tests, and was of the opinion preliminarily that Defendant sustained brain damage localized to the frontal lobe region, that he has little or no memory of the events forming the basis of the criminal charges, and that he was not competent to stand trial. Dr. Dattilio cautioned, however, that "more extensive neuropsychological testing needs to be conducted in order to render a more precise diagnosis of his neuropsychological deficits." (Defense Exhibit 4, Dattilio Report dated December 22, 2008, p. 11).

Dr. Robert Sadoff, a forensic psychiatrist, also testified at the competency hearing on Defendant's behalf. Dr. Sadoff testified that he had examined Defendant, and reviewed and relied upon the psychological test results taken by Dr. Dattilio. Dr. Sadoff accepted Dr. Dattilio's summation of Defendant's medical records; he did not personally examine these records. Dr. Sadoff further testified that the information contained in Dr. Dattilio's report clearly established that

Defendant had significant cognitive deficits and was not a malingerer. After explaining the results of his own examination, and the limitations and disabilities he observed, Dr. Sadoff concluded:

> **Assuming that he has no memory of what happened and cannot, as a result, work with his attorney in preparing a rational defense, it is my opinion, within reasonable medical certainty, that Ralph Fahringer is currently not mentally competent to proceed. He does not know the functions of the principal participants in the courtroom and does not have the ability to work rationally with his attorney in preparing his defense.**

(Defense Exhibit 3, Sadoff Report dated May 6, 2009, p. 6). However, Dr. Sadoff also cautioned that Defendant required outpatient treatment, with medication, and recommended a repeat evaluation. (Defense Exhibit 3, Sadoff Report, p. 6).

Finally, Dr. Timothy J. Michals, also a forensic psychiatrist, testified on behalf of the Commonwealth. In addition to his own examination of Defendant, Dr. Michals reviewed the reports of Dr. Dattilio and Dr. Sadoff. Dr. Michals did not accept the premise that Defendant sustained traumatic brain damage in the December 7, 1998, motor vehicle accident, asserting that there was insufficient evidence to support this conclusion; contended that the tests administered by Dr. Dattilio were dependent on the accuracy of Defendant's self reporting and not conclusive; and opined that Defendant was

either feigning or exaggerating his disability. Neither Defendant nor his wife testified at the competency hearing.

DISCUSSION

At this time, we address only whether Defendant is competent to stand trial, not whether his mental and cognitive impairments provide a legal defense.[2] "In order to be competent to stand trial, a defendant must be able to consult with counsel with a reasonable degree of rational understanding, and he must have a rational understanding of the nature and object of the proceedings against him." United States v. Vanasse, 48 Fed.Appx. 30, 32 (3rd Cir.(Pa.) 2002) (citation omitted). Likewise, Section 402 (a) of the Mental Health Procedures Act provides that a defendant is legally incompetent if he is "substantially unable to understand the nature or object of the

[2] The standards relative to competency to stand trial and those necessary to establish insanity are distinct. Commonwealth v. Hughes, 865 A.2d 761, 788 n.29 (Pa. 2004). Both the relevant time periods and tests to be applied differ. "Competency to stand trial pertains to the time of the trial or other legal proceedings, while sanity concerns the time of the commission of the offense." Commonwealth v. Appel, 689 A.2d 891, 899 n.8 (Pa. 1997). Further, while competency involves an assessment of a defendant's ability to consult with counsel, participate in his defense, and understand the nature of the proceedings, the defense of insanity is the M'Naghten "right or wrong" test: whether the defendant, at the time of the offense, understood the nature and quality of his actions or whether he knew that his actions were wrong. *See* 18 Pa.C.S.A. § 315(b).

In the instant case, the evidence at the April 7 hearing was confined to psychological/psychiatric testimony as it relates to competency and did not address the separate issue of Defendant's criminal responsibility. As an aside, we note that the Mental Health Procedures Act authorizes a trial court, in its discretion, "to make a broad inquiry into a defendant's criminal responsibility, and to make a pre-trial *factual* determination concerning a defendant's criminal responsibility." Commonwealth v. Scott, 578 A.2d 933, 938 (Pa.Super. 1990); *see also* 50 P.S. § 7404 (a). "Such a determination may be made only in conjunction with a pre-trial competency examination and hearing." *Id.* at 937.

proceedings against him or to participate and assist in his defense." 50 P.S. § 7402(a). Stated similarly, "the relevant question is whether the defendant has sufficient ability at the pertinent time to consult with counsel with a reasonable degree of rational understanding and have a rational as well as a factual understanding of the proceedings." Appel, 689 A.2d at 899 (citations and quotation marks omitted).

"A defendant's competency is an absolute and basic condition of a fair trial, and conviction of a legally incompetent defendant violates his constitutionally guaranteed due process rights." Appel, 689 A.2d at 898. "[A]n incompetent defendant who lacks the ability to communicate effectively with counsel may be unable to exercise rights deemed essential to a fair trial, *e.g.*, whether to plead guilty or to proceed to trial, whether to waive the privilege against compulsory self-incrimination, whether to waive the right to a jury trial when applicable, and whether to waive the right to confront one's accusers by declining to cross-examine prosecution witnesses." Commonwealth v. Tizer, 684 A.2d 597, 602 (Pa.Super. 1996). "[A]n erroneous determination of competence threatens a fundamental component of our criminal justice system – the basic fairness of the trial itself." Cooper v. Oklahoma, 517 U.S. 348, 364, 116 S.Ct. 1373, 1382, 134 L.Ed.2nd 498 (1996) (citation and quotation marks omitted). Nevertheless, because a

defendant is presumed competent, the burden of showing otherwise is upon the defendant. Commonwealth v. duPont, 681 A.2d 1328, 1330 (Pa. 1996). This burden is met by a preponderance of the evidence. *Id.*

Further, a "defendant's fundamental right to be tried only while competent outweighs the State's interest in the efficient operation of its criminal justice system." Cooper, 517 U.S. at 367, 116 S.Ct. at 1383 (stating also that "the State may detain the incompetent defendant for the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [competence] in the foreseeable future"). If found to be incompetent, trial must be stayed for so long as such incapacity persists. 50 P.S. § 7403(b). If there is no substantial probability that capacity will be regained in the foreseeable future, the defendant must be discharged. 50 P.S. § 7403(d). "In no instance, except in cases of first and second degree murder, shall the proceedings be stayed for a period in excess of the maximum sentence of confinement that may be imposed for the crime or crimes charged or ten years, whichever is less." 50 P.S. § 7403(f).

At the competency hearing, Defendant presented a *prima facie* case of incompetency. Both Dr. Dattilio and Dr. Sadoff testified that Defendant's full-scale IQ score of 77 places him in the borderline range of intellectual functioning and that

Defendant functions at a primitive level. His thinking is simplistic, hollow and extremely concrete, with little depth of understanding, and he is unable to appreciate the consequences of his actions. He has difficulty in concentrating and maintaining a chain of thought, and his ability to store and retrieve information is poor. All may indicate brain damage.

Both of Defendant's experts also testified that Defendant has no true understanding of the criminal charges lodged against him, that he does not understand what the charges mean or their seriousness or the potential consequences if he is found guilty, and that he neither understands or appreciates the respective roles or functions of the prosecutor, his counsel, the court or himself. Moreover, with one exception, during the hearing Defendant appeared inattentive and disinterested. ***Cf.*** **Commonwealth v. McGill, 680 A.2d 1131 (Pa. 1996) (trial court's observations of defendant during colloquies and throughout trial supported the conclusion that defendant was competent to stand trial). All of this points to Defendant being incompetent to proceed.**[3]

Dr. Michals, in contrast, focused his opinions and conclusions as to Defendant's competency solely on whether Defendant remembers and can recall what happened between him and

[3] **In addition to Defendant's cognitive deficits, which Defendant's experts attribute to traumatic brain damage, Defendant's experts also testified that Defendant is mildly bipolar. While by itself not disabling, this mental illness appears to compound Defendant's difficulties and limitations.**

the victim. Specifically, Dr. Michals opined that Defendant's "claim of having no memory of what happened is volitional in nature and self-serving, rather than the result of a psychiatric disorder." (Commonwealth Exhibit 3, Dr. Michals Report dated January 18, 2010, p. 3). To some extent, Dr. Sadoff's opinion that Defendant is not mentally competent is also based on whether or not Defendant can recall what actually happened. (Defense Exhibit 3, Sadoff Report, p. 6).

To the extent Dr. Michals and Dr. Sadoff base their opinions of Defendant's competency to stand trial solely on whether he can recall what happened, this is error. While such inability unquestionably affects Defendant's competency as a witness to testify to such events, by itself, it does not determine his competency to stand trial.

> **Absent evidence of a mental disability interfering with the defendant's faculties for rational understanding, it is settled that mere vacuity of memory is not tantamount to legal incompetency to stand trial. It is only where the loss of memory effects or is accompanied by a mental disorder impairing the amnesiac's ability to intelligently comprehend his position or to responsibly cooperate with counsel that the accused's guaranties to a fair trial and effective assistance of counsel are threatened and therefore incapacity to stand trial may be demonstrated. *See* Commonwealth v. Barky, 476 Pa. 602, 383 A.2d 526 (1978).**

Commonwealth v. Epps, 411 A.2d 534, 536 (Pa.Super. 1979); *see also* Commonwealth v. Kotzman, 7 Pa.D.&C.3d 209, 213 (Pa.Com.Pl. 1978).

In addition, Dr. Michals failed to address Defendant's ability to work with counsel and assist in his defense. Commonwealth v. Powell, 439 A.2d 203, 205 (Pa.Super. 1981) ("If a person is incapable of co-operating with his counsel in his defense of a criminal charge because of mental illness, then he is incompetent to stand trial."); *cf.* Commonwealth v. Banks, 521 A.2d 1 (Pa. 1987) (defendant's ability to cooperate and not whether he is actually cooperating is essential to the determination of legal competency to stand trial).

While Defendant has presented a *prima facie* case of incompetency and is entitled, on a preliminary basis, to this finding, such finding is not without qualification. The only testimony presented was that of expert witnesses. Neither the defendant, his wife, nor anyone familiar with Defendant's functioning in the real world testified. In this respect, Judge Spaeth astutely observed the following in Commonwealth v. Smith, 324 A.2d 483, 489 (Pa.Super. 1974):

> **To the extent that psychiatric testimony is utilized, however, it should be descriptive of the defendant's condition rather than conclusory. Like criminal responsibility, incompetency is a legal question; the ultimate responsibility for its determination must rest in a judicial rather than a medical authority. In relying on**

> conclusory psychiatric testimony, often expressed in the same terms as the ultimate incompetency question, the courts shift responsibility for the determination to psychiatrists who have no special ability to decide the legal issue. Indeed, there is repeated evidence that psychiatrists often misunderstand the test of incompetency and confuse it with the test of criminal responsibility. Medical opinion about the defendant's condition should be only one of the factors relevant to the determination. A defendant's abilities must be measured against the specific demands trial will make upon him, and psychiatrists have little familiarity with either trial procedure or the complexities of a particular indictment.

In addition to being denied direct evidence of Defendant's inter-relationships and functioning during a typical day, many unanswered questions exist concerning the precise limitations of Defendant's capacity to comprehend and participate in these proceedings. For instance, after the December 7, 1998, motor vehicle accident and before Defendant was awarded social security benefits in 2002, the evidence established that Defendant held at least four separate jobs. Although this employment appeared to be at entry levels and unskilled, the mental demands of these jobs was never inquired into. Moreover, not only was the exact determination of Defendant's social security disability never identified, the standard for receipt of social security disability benefits is distinct and different from that required to establish incompetency for trial purposes. It is also likely that even

before the 1998 motor vehicle accident Defendant was functioning within the low to average range of intelligence. As is the case for setting the standards for mental retardation in capital cases, a low IQ, by itself, does not establish incompetency for trial purposes. *Cf.* Commonwealth v. Miller, 888 A.2d 624, 631 (Pa. 2005) ("[W]e do not adopt a cut-off IQ score for determining mental retardation in Pennsylvania, since it is the interaction between limited intellectual functioning and deficiencies in adaptive skills that establish mental retardation.").

In addition, during the period between the motor vehicle accident and Defendant's social security disability award, Defendant was able to intermingle and socialize with other individuals; it was during this period that Defendant met, dated and married his wife. Further, there is no indication in the record that Defendant is confined to home or needs supervision. To the contrary, at the time of the offenses with which Defendant is charged, Defendant was coaching flag football and, in response to the police's investigation of the charges, Defendant was able to recall and communicate to the police what happened. Medication which Defendant has resumed taking since the date of the alleged offenses has enhanced his functioning and may continue to do so. In addition, at the time of hearing, Defendant appeared to be athletic and in good physical

condition; he was reported to be able to take care of his basic needs and was also able to drive a motor vehicle. While Defendant stays home watching TV most of the day, the types of programs he watches were never identified. Also, at one point during the proceedings, when questioned by his counsel at the counsel table, Defendant appeared able to focus and to respond to counsel's inquiries.

CONCLUSION

After taking into account the evidence that was presented, as well as the gaps in such evidence, and the preliminary nature of the evaluations performed by Dr. Dattilio and Dr. Sadoff, we have sufficient reservation about Defendant's competency to stay these proceedings pending further evaluation of Defendant's capacity to stand trial. It is also our intent to order an incompetency evaluation by a court-appointed psychiatrist in accordance with Sections 7402(d) and (e) of the Mental Health Procedures Act. 50 P.S. §§ 7402(d) and (e).

BY THE COURT:

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P.J.