Circuit Court for Frederick County
Case No. 10-K-16-058176

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1093

September Term, 2017

ANTHONY S. ALSTON

v.

STATE OF MARYLAND

Wright,
Leahy,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: August 6, 2018

Appellant, Anthony S. Alston, was indicted on 15 counts related to the possession and distribution of narcotics. During pretrial proceedings, Alston became dissatisfied with his attorney provided by the Office of the Public Defender. The trial court ruled that he had no meritorious reason to discharge his attorney,[1] but Alston nevertheless chose to do so and opted to represent himself. Following a four-day bench trial, Alston was convicted of seven drug-related offenses and sentenced to a mandatory minimum of 25 years imprisonment followed by five years of supervised probation. On appeal, Alston argues that the trial court erred in allowing him to represent himself without making a specific determination that he was competent to make that decision. Because we conclude that the issue of Alston's competency did not arise before the trial court, we affirm Alston's convictions.

DISCUSSION

Notably, Alston does not claim that he was not competent to stand trial, but rather that he was not competent to represent himself. He contends that as a matter of law these are two separate inquiries and that a heightened standard of competency applies to the question of whether a defendant is competent to represent himself.[2] Before Alston can

[1] An indigent defendant's right to free appointed counsel does not extend to selecting counsel of his or her choice. *Dykes v. State*, 444 Md. 642, 646 (2015). If the trial court determines that there is a meritorious reason to discharge an appointed attorney, the accused retains the right to have new counsel appointed. *Id.* at 647. But if there is no meritorious reason, discharging appointed counsel may be regarded as a waiver of counsel. Md. Rule 4-215; *Dykes*, 444 Md. at 646-47.

[2] A person accused of a crime has both the right to the effective assistance of counsel, and the right to reject that assistance and represent himself. *Faretta v. California*,

challenge the standard under which the trial court should have evaluated his competency, however, he first must establish that the trial court needed to evaluate his competency at all. This he fails to do.

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422 U.S. 806, 807 (1975); *Dykes*, 444 Md. at 648; *Williams v. State*, 321 Md. 266, 270-71 (1990). But the right of self-representation is not absolute. *Indiana v. Edwards*, 554 U.S. 164, 171 (2008); *Muhammad v. State*, 177 Md. App. 188, 240-41 (2007). Because choosing self-representation necessarily includes waiving the right to counsel, a trial court must ensure that the waiver is knowing and voluntary. *State v. Campbell*, 385 Md. 616, 627 (2005); Md. Rule 4-215 (b), (e).

While an inquiry into the basic competency to stand trial asks whether a defendant has the *ability to understand* the proceedings, an inquiry into the knowing and voluntary waiver of counsel asks whether a defendant *actually understands* the significance and consequences of the decision being made. *Godinez v. Moran*, 509 U.S. 389, 400-01 n.12 (1993). In *Indiana v. Edwards*, the United States Supreme Court recognized the possible existence of a narrow zone of incompetence in which a defendant may understand the proceedings and be capable of consulting with an attorney, but may not be competent to mount a defense without such assistance. 554 U.S. at 175-76. The Supreme Court concluded that under those circumstances, a state is permitted to grant a defendant the right of self-representation without running afoul of the Federal Constitution and explicitly rejected the invitation to impose, as a matter of federal constitutional law, a mandatory heightened standard. *Id*. at 178. Thus, states are free to independently determine whether to adopt a heightened standard to evaluate a defendant's mental capability to conduct his own defense. *Id*. at 177-78.

Maryland has declined to adopt a heightened standard for evaluating whether a defendant is competent to waive counsel. *Gregg v. State*, 377 Md. 515, 549 (2003). The level of competency required to make a knowing and voluntary decision to waive counsel is therefore the same level of competency that is required to stand trial: a defendant must be able to understand the nature of the proceedings against him and to assist in his own defense. CP § 3-101(f); *Peaks v. State*, 419 Md. 239, 250 (2011); *Gregg*, 377 Md. at 549. This standard does not consider an accused's potential skill at representing himself, nor the wisdom of choosing to do so; it only asks whether he understands the significance and potential consequences of the choice he is making. *Gregg*, 377 Md. at 548; *Johnson v. State*, 67 Md. App 347, 373 (1986). Neither this Court nor the trial court is free to disregard *Gregg* and impose a heightened standard of competency on a defendant who seeks to represent himself. Thus, even if the issue of Alston's competence to represent himself had been properly raised, the trial court would have been correct to evaluate his competence to represent himself under the same standard as it evaluated his competence to stand trial.

A presumption exists that a person charged with a crime is competent to stand trial. *Wood v. State*, 436 Md. 276, 287 (2013); *Peaks v. State*, 419 Md. 239, 251 (2011) (citing *Ware v. State*, 360 Md. 650, 703 (2000)). Under any of three circumstances, however, the presumption of competence may be called into question and the trial court must then investigate the defendant's competency. Those three circumstances are: "(1) upon motion of the accused; (2) upon motion of the defense counsel; or (3) upon a *sua sponte* determination by the court that the defendant may not be competent to stand trial." *Kennedy v. State*, 436 Md. 686, 694 (2014) (quoting *Thanos v. State*, 330 Md. 77, 85 (1993)). No specific formulation is required to trigger the trial court's duty to conduct a competency evaluation, but a request must be sufficiently clear, or a defendant's behavior sufficiently egregious, so as to put the trial court on notice. *Kennedy*, 436 Md. at 694-95 (citing *In re Ryan S.*, 369 Md. 26, 34 (2002)); Md. Rule 4-323(c); *see also, e.g.*, *Gregg*, 377 Md. at 545-46 (noting that stubborn and argumentative behavior along with evidence of two stays in mental institutions for evaluation were insufficient to trigger the trial court's duty); *Thanos*, 330 Md. at 85 (noting that "whimsical" decisions and strange remarks along with a general history of mental illness were insufficient to trigger the trial court's duty). Once on notice, the trial court must make a competency determination from evidence presented on the record. Md. Code Crim. Proc. ("CP") § 3-104(a); *see also Kennedy*, 436 Md. at 693-94; *Peaks*, 419 Md. at 251-52; *Roberts v. State*, 361 Md. 346, 363-64 (2000). Competency is a factual determination that will not be reversed unless clearly erroneous. *Peaks*, 419 Md. at 252, 256. We review the evidence in the record as a whole to determine if the trial court

erred in not conducting a competency hearing. *Gregg*, 377 Md. at 546-47; *Thanos*, 330 Md. at 586-87.

Alston points to three interactions with the trial court that he argues should have alerted the court that his competency needed evaluating. Alston alleges: *first*, that he made a direct request for a competency evaluation that the trial court ignored; *second*, that before being discharged, his appointed counsel informed the trial court that Alston was not competent to represent himself; and *third*, that during questioning to ensure that his waiver of counsel was knowing and voluntary, *see* Md. Rule 4-215, he made a revelation about his mental health history that should have triggered the trial court's duty to evaluate his competency. For the reasons that follow, however, we conclude that none of these events triggered the trial court's duty.

First, during an early pretrial hearing, Alston and the trial court discussed his options for replacing his appointed counsel:

> ALSTON: So I can't – I mean, you can't – I mean, give me a pro bono lawyer? Can I write the Court?
>
> COURT: I don't know what you – a pro bono lawyer means a lawyer for free. Okay?
>
> ALSTON: Yes.
>
> COURT: The only way you can do that is through the public defender's office. If there's a volunteer lawyer out there that would take your case, sure. I don't know of any, but I'd be careful on that, because it's usually a young person fresh out of law school that is inexperienced.
>
> ALSTON: I don't care if it's a young person. I don't have no problem with a person that's learning.

COURT: You want them cutting their teeth on your case with wiretaps? Very complicated.

ALSTON: I mean, every time I ask her about a wiretap, she says she don't know. And it's been two years. So I mean, I – well, I don't know.

COURT: All right, well, knowing the options that I've told you that you have, what do you want to do?

ALSTON: *I mean, well, I might want to go talk to a psychiatrist or something and see if I'm in the right frame of mind before I make this decision.*

COURT: Okay.

ALSTON: So I'm asking for a continuance.

COURT: All right. So you think – I'm not going to give you one now, but there may come to a point where you need one and I'll ask you.

(emphasis added).

Alston argues that his statement was, in effect, his way of asking for a competency evaluation that the trial court ignored. We cannot agree. This was not a request and the trial court was not required to treat it as one. The simple mention of a psychiatrist, or a comment that at some point in the future Alston might want to see a psychiatrist, does not trigger the trial court's duty to inquire into his competency. *Kennedy*, 436 Md. at 694-95. While a literal reading of his words may be about seeing a psychiatrist, in the context of Alston's conversation with the trial court it is clear that Alston did not intend to make a serious request, nor did the court interpret it that way. In fact, Alston's comment illustrated his awareness of the gravity of his circumstances. We will not review his statement in isolation now to impute a meaning that he did not intend at the time.

Second, prior to being discharged, Alston's appointed counsel drew the trial court's attention to the case of *Indiana v. Edwards*, discussed *supra* n.2, in which the United States Supreme Court discussed the issues of competency to represent oneself and to stand trial. 554 U.S. 164, 177-78 (2008). Alston's counsel told the trial court that the *Edwards* case contained language indicating that "a defendant can be competent to stand trial but not be competent to act as his own counsel, depending on the complexity of the case. And I just feel like I would be remiss if I didn't bring that to the Court's attention." Counsel made no other comments regarding *Edwards*.

Now Alston argues that by citing *Edwards*, his attorney intended to make a motion that Alston's competency required evaluation. Again, we cannot agree. It was not a motion, and if Alston's counsel intended it as one it lacked the clarity required to trigger the trial court's duty to inquire. *Kennedy*, 436 Md. at 694-95. If Alston's attorney had harbored doubts about Alston's competence, simply noting the general principle of *Edwards*, without more, was insufficient to alert the trial court that it had a duty to take any particular action. *Kennedy*, 436 Md. at 694-95. There is no indication, however, that Alston's attorney raised *Edwards* because she doubted Alston's competence, only that she had concerns about the complexity of the case.[3] While the complex legal landscape may have made it

[3] The complexity of the case was largely responsible for Alston's dissatisfaction with his attorney in the first place. The investigation into the charges against Alston had spanned more than six months and included 40 hours of audio from wiretapped conversations that had generated more than 3000 pages of transcripts. Alston thought that his attorney was not devoting enough time to his case or meeting with him often enough, and was unhappy that she was not explaining her decisions regarding his defense, not

particularly unwise for Alston to represent himself, it did not render him incompetent to make the decision to do so. *Johnson*, 67 Md. App. at 373. A defendant's substantive legal knowledge is irrelevant to the determination of whether he is competent. *Faretta v. California*, 422 U.S. 806, 835 (1975); *Muhammad v. State*, 177 Md. App. 188, 258-59 (2007).

Finally, during the trial court's inquiry into whether Alston made a knowing and voluntary decision to discharge his attorney, Alston mentioned that at age sixteen—approximately 30 years earlier—a psychiatrist told him that he sometimes had trouble understanding things. In response to follow-up questioning, Alston also stated that he had not seen a psychiatrist since then. Finally, he told the court that he understood what was going on in court and the decisions that he was making. Alston now asserts that his responses to the trial court's questioning revealed that he had been diagnosed with a mental illness that went untreated for more than thirty years, and the court therefore had a duty to raise the issue of his competency on its own motion. But again, we cannot agree.

Alston correctly asserts that a trial court must raise the issue of a defendant's competence on its own motion if evidence exists that creates a "bona fide doubt" as to a defendant's competence to stand trial. *Wood*, 436 Md. at 290-91; *Gregg*, 377 Md. at 528; *Thanos*, 330 Md. at 585. Beyond the single statement to which Alston points, however, we can find no evidence that he had a history of mental health problems or any episodes of

conducting an independent investigation to counter the one done by the police, and not filing motions for discovery that Alston thought could help refute the State's evidence.

irrational behavior. *Compare Thanos*, 330 Md. at 85-86. To the contrary, our review of the record shows that Alston was well aware of his circumstances and gave careful thought to his decisions. Alston disagreed with his attorney about how to prepare for trial and present his defense, showing that he was able to critically evaluate the evidence and his attorney's actions. *See Thanos*, 330 Md. at 587. He was indecisive about whether to discharge his attorney, at least suggesting that he understood the consequences of his choice. *See Johnson v. State*, 138 Md. App. 539, 567 (2001). Following the discharge of his attorney, Alston's discussions with the court were coherent and rational. He made well-reasoned arguments, filed motions, and conducted discovery. There is no doubt that Alston understood the nature of the proceedings and was able to participate in his defense.

We conclude that neither Alston, nor his attorney, said or did anything that the court should have interpreted as a request for a competency evaluation, and no independent reason arose for the trial court to doubt that Alston was competent. Thus, the trial court did not err in allowing Alston to exercise his right to represent himself.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.