IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR OSCEOLA COUNTY, FLORIDA

CASE NO.: 2019-CA-2850-OC
LOWER CASE NO: 2019-CT-2372

ROBERT STEVEN ORTIZ, JR.,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.
_____/

Petition for Writ of Certiorari
Christine E. Arendas, County Court Judge.

Robert Wesley, Public Defender and
Sarah L. B. Jordan and Emily Adams, Assistant Public Defenders,
for Petitioner.

No appearance required for Respondent.

Before SCHREIBER, WOOTEN, and MADRIGAL, III, J.J.

PER CURIAM.

Petitioner alleges the trial court failed to make a competency determination in Osceola County criminal case number 2019-CT-2372 within 20 days of having reasonable grounds to believe Petitioner was incompetent to proceed, as required by Florida Rule of Criminal Procedure 3.210. According to the record provided to this Court, Petitioner was arrested for obstruction of a public street without a permit on July 8, 2019. On July 18, 2019, Petitioner pled not guilty and his case was set for pre-trial conference on September 25, 2019.

On August 3, 2019, defense counsel filed a "Motion that Defense Counsel has Reasonable Grounds to Believe Defendant is not Competent to Proceed and Request for Hearing" (hereinafter, the "Competency Motion"). Along with the Competency Motion,

Petitioner filed a "Notice of Confidential Information within Court Filing" and a Forensic Psychological Evaluation conducted by Dr. Leonard Skizynski. Dr. Skizynski's recommendation was for the trial court to consider Petitioner incompetent to proceed.

The Competency Motion was set for hearing on August 23, 2019. At the hearing, defense counsel advised the trial court that she had reasonable grounds to believe Petitioner was incompetent, and she requested to present Dr. Skizynski's testimony regarding Petitioner's incompetency. (Hr'g Tr. at 5.) When defense counsel advised the trial court that Dr. Skizynski's evaluation was conducted confidentially, the State objected and requested a court-ordered evaluation with notice to allow the State to attend. (Hr'g Tr. at 5.) The trial court then asked whether there was any reason Dr. Skizynski could not testify at the hearing, since he was already present, and the parties did not object. Defense counsel did object to the State's request for a court-ordered evaluation on the basis that "[t]he rule clearly states that a motion for examination should be made within the 20 days of filing the motion for reasonable grounds and the State failed to do that." (Hr'g Tr. at 6.)

After hearing Dr. Skizynski's testimony, the trial court stated: "We're not even close to a final hearing yet. Because based on the testimony of Dr. Skizynski as well as this Court's review of his report, there are lots of questions about the competency or incompetency of Mr. Ortiz." (Hr'g Tr. at 42.) The Court could not conclude, based solely on Dr. Skizynski's report and opinion, whether Petitioner was incompetent or competent to proceed. The trial court ordered that an evaluation be conducted by Dr. Davis and that Dr. Davis be given access to Petitioner's records at Park Place as part of his evaluation since Dr. Skizynski did not have the opportunity to review those records. (Hr'g Tr. at 42.) The trial court denied Petitioner's request

for release and ordered that Petitioner remain in custody at least until Dr. Davis' evaluation was complete or a hearing was set on the matter of Petitioner's release. (Hr'g Tr. at 43.)

Florida Rule of Criminal Procedure 3.210(b) provides, in relevant part:

> If, at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, *has reasonable grounds to believe that the defendant is not mentally competent to proceed*, the court shall *immediately enter its order setting a time for a hearing to determine the defendant's mental condition*, which *shall be held no later than 20 days after the date of the filing of the motion*, and *may order the defendant to be examined by no more than 3 expert*s, as needed, *prior to the date of the hearing*.

Fla. R. Crim. P. 3.210(b). (Emphasis added.)

"When a trial court orders an evaluation, it suggests there are reasonable grounds to believe the defendant is incompetent." *Flaherty v. State*, 266 So. 3d 1187, 1188 (Fla. 4th DCA 2019) (citations omitted). "Once a trial court has reasonable grounds to believe the defendant is incompetent and orders an examination, it must hold a hearing, and it must enter a written order on the issue." *Simmons v. State*, 271 So. 3d 997, 999 (Fla. 4th DCA 2019) (citations omitted); *see also* Fla. R. Crim. P. 3.212(b).

Per rule 3.210, when defense counsel files a motion with reasonable grounds that her client is incompetent to proceed, the court must immediately set a hearing to determine the defendant's mental condition, which shall be heard no later than 20 days after the filing of defense counsel's motion. Here, the certificate of service in defense counsel's Competency Motion indicates the Motion was "E-Filed" on August 3, 2019, which means the trial court was to hold the hearing no later than on or about August 23, 2019. Rule 3.210 allows a court to order that a defendant be examined by no more than three experts as necessary "prior to the date of the hearing."

In Petitioner's case, the trial court heard the Competency Motion within the time required under rule 3.210 – August 23, 2019. The State objected to the confidential evaluation conducted by Dr. Skizynski and asked for a court-ordered evaluation to be conducted and to be provided notice of the evaluation. As correctly noted by defense counsel, the State did not have the right to be present at the confidential examination. *See Sanfeliz v. State*, 58 So. 3d 390, 392 (Fla. 5th DCA 2011).

However, rule 3.210 does not prohibit a court from ordering a second evaluation, or even a third evaluation. The rule provides that a court *may* order that Petitioner be examined by no more than three experts, *as needed*, before the hearing. Thus, it is not mandatory for the trial court to order additional evaluations prior to the hearing and, more importantly, in some cases, it may not be necessary to order additional evaluations at all.

There is nothing prohibiting a trial court from deciding Petitioner's competency based on one evaluation. Likewise, there is nothing in rule 3.210 nor rule 3.212 that requires a trial court to accept the findings made by one doctor. Before the hearing, the trial court did not have the benefit of Dr. Skizynski's testimony to decide Petitioner's competency. At the hearing, the State argued that a court-ordered evaluation was required. (Hr'g Tr. at 11.) Yet, that is not completely accurate. The trial court can order an evaluation (no more than three), if requested by a party, or may do so *sua sponte*, but a court-ordered evaluation is not required. And as previously noted, the trial court can order the evaluation prior to the hearing, but it is not prohibited from doing so at the hearing, if it deems it necessary to determine Petitioner's competency.

The trial court was required to hold a hearing on defense counsel's Competency Motion within 20 days of the date the Competency Motion was filed, which it did. At the close of the

August 23 hearing, the trial court set the matter for a Competency Status Hearing on October 23, 2019. Petitioner is essentially demanding that the trial court be forced to make an independent determination of competency based on the opinion of a single doctor, without stipulation by the parties. This Court cannot mandate that relief.

This Court notes that as a general rule, defendants are presumed sane when they enter the courtroom. *See Moreno v. State*, 232 So. 3d 1133, 1136 (Fla. 3d DCA 2017) (citing to *Flowers v. State*, 353 So. 2d 1259, 1260 (Fla. 3d DCA 1978)). They are deemed competent until there is a judicial determination of incompetency. *See Peoples v. State*, 251 So. 3d 291, 297 (Fla. 1st DCA 2018) ("once a defendant has been declared competent, he is presumed competent in subsequent proceedings…"); *see also Gollomon v. State*, 226 So. 3d 332 (Fla. 2d DCA 2017) (an individual adjudicated incompetent is presumed to remain incompetent until adjudicated competent to proceed by a court). Therefore, in this Court's review of the record, if the lower court found the evidence at the hearing was insufficient to deem Petitioner incompetent as a matter of law, Petitioner remains competent. The Court concludes the lower court did not violate the rules, nor abuse its discretion in requesting an additional evaluation and evidence in order to determine whether Petitioner is incompetent.

Petitioner's alternative request for relief is to be released on his own recognizance since he has been in custody for the maximum penalty of the charged offense. First, the Court cannot decipher the maximum penalty for the offense charged because the record provided does not reference the charges the State filed against Petitioner. A copy of the Information was not provided. Second, Petitioner's sole argument is that he should be released because he has been in custody for the statutory maximum amount of time for the charge.

This alternative request amounts to a petition for writ of habeas corpus. However, Petitioner provides no authority to establish a basis for relief. According to the record provided to this Court, if he was determined incompetent to proceed at the hearing, he likely should have been released. *See generally Paolercio v. State*, 129 So. 3d 1174, 1176 (Fla. 5th DCA 2014) (where a court cannot order treatment to restore an incompetent defendant to competency, the defendant cannot remain in jail indefinitely, and the only remedy is for the State to institute civil commitment proceedings).

Rule 3.210 allows a court to order a defendant into custody so that an evaluation can be conducted, if the court determines the defendant will not submit to the evaluation or it is unlikely that he will. *See* Fla. R. Crim. P. 3.210(b)(3). Notwithstanding rule 3.210(b)(3), there is nothing prohibiting a trial court from releasing a defendant subject to pre-trial release conditions it deems appropriate, after the evaluation is completed. Ultimately, the Court concludes that it cannot grant the alternative relief Petitioner requests.

Accordingly, based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petition for a Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers, in Osceola County, Kissimmee, Florida, this _____ day of March, 2020.

_____
MARGARET H. SCHREIBER
Circuit Court Judge

WOOTEN and MADRIGAL, III, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order was furnished on this _____ day of March, 2020, to the following: **Sarah L. B. Jordan, Esq., Assistant Public Defender,** 2 Courthouse Square, Suite 1600, Kissimmee, Florida 34741, sjordan@circuit9.org; **Emily Adams, Esq.**, **Assistant Public Defender,** 2 Courthouse Square, Suite 1600, Kissimmee, Florida 34741, eadams@circuit9.org; and to the **Office of the State Attorney**, 2 Courthouse Square, Suite 3500, Kissimmee, Florida 34741.

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Judicial Assistant