

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-240

Filed: 31 December 2020

Wake County, Nos. 17 CRS 216439, 19 CRS 548

STATE OF NORTH CAROLINA

v.

JERRY JEROME TARRANCE, II

Appeal by defendant from judgments entered 1 August 2019 by Judge Michael J. O’Foghludha in Wake County Superior Court. Heard in the Court of Appeals 17 November 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kacy L. Hunt, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellant.

ZACHARY, Judge.

Defendant Jerry Jerome Tarrance, II, appeals from judgments entered upon a jury’s verdict finding him guilty of four counts of taking indecent liberties with a child. Upon review, we remand for further proceedings.

Background

STATE V. TARRANCE

Opinion of the Court

On 24 August 2017, law enforcement officers arrested and charged Defendant with first-degree rape of a child under the age of 13 by an adult and first-degree statutory rape, and Defendant was held in the county jail pending trial. Between May 2018 and October 2018, Defendant wrote six letters to Senior Resident Superior Court Judge Paul C. Ridgeway addressing the status of his case and his deteriorating mental health. One letter, dated 29 May 2018, included Defendant's handwritten Petition for Judicial Review Mental Evaluation, in which Defendant noted that he was suffering from, *inter alia*, "bipolar behavior," visual and auditory hallucinations, schizophrenia, and suicidal tendencies.

Defendant's counsel filed a Motion to Withdraw, which came on for hearing on 5 September 2018 before the Honorable Winston M. Rozier in Wake County Superior Court. During that hearing, Defendant asked Judge Rozier to order that he be sent to Central Regional Hospital for a mental evaluation, which led to a brief colloquy between Defendant's counsel and Judge Rozier regarding Defendant's mental stability, hallucinations, and schizophrenia. Judge Rozier granted counsel's motion to withdraw, and the following day entered the court's Motion and Order Committing Defendant to Central Regional Hospital – Butner Campus for Examination on Capacity to Proceed ("2018 Order"). In the 2018 Order, Judge Rozier found that Defendant's capacity to proceed was "in question," and that "[a]n examination of the defendant at Central Regional Hospital – Butner Campus to determine the

defendant's capacity would be more appropriate under the provisions of G.S. 15A-1002(b)(2) than a local evaluation."

A Wake County Sheriff's deputy transported Defendant to Central Regional Hospital – Butner Campus on 12 October 2018. It is unclear from the record whether Defendant was evaluated as ordered by Judge Rozier.

On 24 June 2019, the State moved for a continuance of Defendant's scheduled trial, which the trial court granted. Subsequently, the grand jury returned superseding indictments charging Defendant with four counts of taking indecent liberties with a child, as well as having attained the status of a habitual felon. The State dismissed the original charge of first-degree rape.

On 29 July 2019, Defendant's case came on for trial before the Honorable Michael J. O'Foghluha. Without holding a competency hearing to determine whether Defendant had the capacity to proceed, the trial court commenced with Defendant's trial. The jury returned a verdict finding Defendant guilty of four counts of taking indecent liberties with a child. Defendant then pleaded guilty to attaining the status of a habitual felon.

The trial court sentenced Defendant to two consecutive terms of 102-135 months' imprisonment in the custody of the North Carolina Division of Adult Correction, and entered an order requiring Defendant to register as a sex offender for a period of 30 years upon release. Defendant gave oral notice of appeal in open court.

Competency Hearing

On appeal, Defendant raises two issues concerning his competency to stand trial. He argues that the trial court failed (1) to comply with its statutory duty to hold a competency hearing once Judge Rozier questioned Defendant's capacity to proceed; and (2) to conduct a competency hearing *sua sponte* based on the evidence presented at trial, which violated Defendant's constitutional right to due process. The first issue is dispositive.¹

I. Standard of Review

It is axiomatic that "[a]lleged statutory errors are questions of law[.]" *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) (citation omitted). This Court reviews questions of law de novo. *Id.* (citation omitted).

II. Analysis and Remedy

It is undisputed that, *at trial*, neither Defendant nor his counsel informed the trial court that he potentially lacked the mental capacity to proceed. On appeal, the parties disagree as to whether Defendant's failure to raise the issue of his competency at the time of trial resulted in a waiver of his right to appellate review, or whether, in light of our Supreme Court's decision in *In re E.D.*, 372 N.C. 111, 827 S.E.2d 450 (2019), the right to appellate review of this issue is preserved as a matter of law.

¹ Accordingly, we need not address Defendant's second argument on appeal.

STATE V. TARRANCE

Opinion of the Court

We need not resolve that issue here. Having carefully reviewed the record and pertinent statutes, we conclude that “[b]y questioning [his] capacity to proceed, but not conducting a hearing or ruling on the issue,” the trial court acted in contravention of our General Statutes. N.C. Gen. Stat. § 15A-1001(a) (2019) provides that

[n]o person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as “incapacity to proceed.”

Our General Assembly has made manifest that “[t]he question of the capacity of the defendant to proceed *may be raised at any time* on motion by the prosecutor, the defendant, the defense counsel, *or the court*.” N.C. Gen. Stat. § 15A-1002(a) (emphases added). “When the capacity of the defendant to proceed is questioned, the court *shall* hold a hearing to determine the defendant’s capacity to proceed.” *Id.* § 15A-1002(b)(1) (emphasis added). The plain language of these statutory provisions compels the conclusion that once Judge Rozier found that Defendant’s capacity to proceed was “in question,” a competency hearing was statutorily required.

Accordingly, we remand for a retrospective competency hearing. Should the trial court determine that a meaningful hearing is possible, and thereafter “conclude[] from this retrospective [competency] hearing that [D]efendant was competent at the time of trial, no new trial is required.” *State v. McRae*, 139 N.C. App.

STATE V. TARRANCE

Opinion of the Court

387, 394, 533 S.E.2d 557, 562 (2000). However, if “the trial court determines that a meaningful hearing is no longer possible, [D]efendant’s conviction must be reversed and a new trial granted when he is competent to stand trial.” *Id.*

REMANDED.

Judges DIETZ and COLLINS concur.

Report per Rule 30(e).