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IN THE SUPERIOR COURT FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS,

Case No. 18-0012-CR

Plaintiff,

v.

SEARCH OSILEK, JR.,

Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW HOLDING
THAT DEFENDANT IS COMPETENT
TO STAND TRIAL

A6
J. Hovey

INTRODUCTION

This matter comes before the Court on the issue of Search Osilek, Jr.'s ("Search") competency to stand trial. During a status conference on April 2, 2019, the parties moved for Search to undergo a competency evaluation. From September through October 2019, this Court heard testimony from a psychiatrist, a psychologist, Search's high school teachers and former administrators, members of Search's dance group, Search's previous employer, and Search's court-appointed counsel. In each hearing, Samantha Vickery was present representing the Commonwealth, and Search was present with counsel—initially David G. Banes¹ and later Joseph E. Horey.

Having carefully considered the testimonies and the reports submitted by both the Commonwealth and the defense, the Court finds Search competent to stand trial. The Court finds that Search has sufficient present ability to consult with his lawyer with a

¹ On September 17, 2019, David Banes withdrew as Search's counsel to testify about Search's competency. As a result, Joseph Horey substituted for David Banes.

1 reasonable degree of rational understanding—and that he has a rational as well as factual
2 understanding of the proceedings against him. *See Dusky v. United States*, 362 U.S. 402
3 (1960).

4 **BACKGROUND**

5 On January 30, 2018, Search was charged with sexual abuse of a minor in the first
6 degree and sexual assault in the first degree. The next day, the Court heard testimonies
7 from the Commonwealth's witnesses, and it found probable cause for the crimes alleged
8 against Search. The Court subsequently appointed David Banes to represent Search in this
9 matter.

10 On April 11, 2018, Search filed a Motion for Mental Examination, notifying the
11 Court that he intended to rely upon the defense of insanity at the time of the alleged crime.
12 Two weeks later, the Court ordered that Search undergo a psychiatric examination to
13 determine whether he had any mental illness, disease, or defect at the time of the offense.
14 The Court also ordered a psychiatric evaluation to determine Search's competency to stand
15 trial; it appointed Dr. Martin Blinder ("Dr. Blinder"), Search's retained psychiatrist, to
16 perform the psychiatric examinations. Thereafter, the Commonwealth hired Dr. Dennis R.
17 Donovan ("Dr. Donovan"), a clinical psychologist, to evaluate Search.

18 The parties subsequently submitted their experts' reports and other documents
19 including a Social Security Administration examination report on Search. At an April 2,
20 2019 status conference, the parties asked the Court to conduct a competency hearing to
21 determine Search's competence to stand trial. From September to October 2019, the Court
22 held competency hearings where it heard testimony from Dr. Blinder and Dr. Donovan;
23 Search's high school teachers and former administrators; members of Search's dance group;
24 Search's previous employer; and Search's court-appointed counsel, David Banes.

25 **LEGAL STANDARD**

26 A defendant is competent to stand trial if he "has sufficient present ability to consult
27 with his lawyer with a reasonable degree of rational understanding—and whether he has a
28 rational as well as factual understanding of the proceedings against him." *Dusky v. United*

1 *States*, 362 U.S. 402 (1960). A defendant must have the "capacity to understand the nature
2 and object of the proceedings against him, to consult with counsel, and to assist in
3 preparing his defense." *Drope v. Missouri*, 420 U.S. 162, 171 (1975). As the Supreme Court
4 observed in *Godinez v. Moran*, "[r]equiring that a criminal defendant be competent has a
5 modest aim: It seeks to ensure that he has the capacity to understand the proceedings and
6 to assist counsel. While psychiatrists and scholars may find it useful to classify the various
7 kinds and degrees of competence . . . the Due Process Clause does not impose these
8 additional requirements." 509 U.S. 389, 402 (1993).

9 It is well-settled that "[n]ot every manifestation of mental illness demonstrates
10 incompetence to stand trial; rather, the evidence must indicate a present inability to assist
11 counsel or understand the charges. Likewise, neither low intelligence, mental deficiency,
12 nor bizarre, volatile and irrational behavior can be equated with mental incompetence to
13 stand trial." *Burket v. Angelone*, 208 F.3d 172, 192 (4th Cir. 2000). Defendant bears the
14 burden of proving incompetence by a preponderance of the evidence. *United States v.*
15 *Robinson*, 404 F.3d 850, 856 (4th Cir. 2005).

DR. BLINDER'S REPORT

On May 8, 2018, Dr. Blinder evaluated Search to determine his competency. To prepare, Dr. Blinder reviewed police reports, witnesses' statements, school records, and the results of a psychometric test conducted on Search in 2008. Dr. Blinder determined that the findings from the psychometric test performed on Search ten years earlier remained relevant for his assessment, so Dr. Blinder deemed any re-testing unnecessary.

22 Dr. Blinder found that Search "presents as a congenial, stocky, presentable man
23 whose surface demeanor and alertness belies his profound cognitive deficits." (Blinder
24 Report at 3.) To support his finding, Dr. Blinder indicated that during his conversation
25 with Search, Search did not know the date, the current U.S. president, or that earth
26 revolves around the sun. (*Id.*) He also found that although Search could read newsprint
27 with comprehension, Search could not recall two of three random words given to him a few
28 minutes before. (*Id.*)

1 But Dr. Blinder also found that Search was alert of his surrounding, and that Search
2 did not appear distracted by internal stimuli. (*Id.*) He found that Search's narrative was
3 fluent, logical, and coherent; Search had "no loosening of associations, inappropriate
4 references or delusions." (*Id.*) Dr. Blinder reported that Search was persuasively adamant
5 about his innocence, claiming: "Sex is a blessing. I would never do it with my niece. I'm
6 too young, too young to have a family or anything. Everybody knows I would never do
7 this. I help people, not hurt them." (*Id.*)

8 Nevertheless, Dr. Blinder found that standard competency protocol questions were
9 "utterly beyond him." (*Id.*) According to Dr. Blinder, Search "could not identify the
10 primary roles of courtroom personnel, distinguish guilt from innocence, [or] define
11 evidence or testimony." (*Id.*) As a result, Dr. Blinder concluded that Search's
12 developmental disability was severe and his mental retardation profound. (*Id.*) He found
13 that Search lacked the wherewithal to follow the contours of the legal road ahead, and that
14 Search could not collaborate constructively with counsel. (*Id.* at 4.) Accordingly, Dr.
15 Blinder determined that Search is not competent to stand trial.

DR. DONOVAN'S REPORT

17 Dr. Donovan, on the other hand, evaluated Search on November 14, 2018. To
18 prepare for his assessment, Dr. Donovan reviewed discovery materials, police reports,
19 Search's educational records, and Dr. Blinder's psychiatric evaluation. (Donovan Report at
20 1-2.) Dr. Donovan also spoke with Search's family members, Search's attorney, and
21 several administrators at Search's high school. (*Id.*)

22 Dr. Donovan learned through various sources that Search was a popular and well-
23 mannered young man who enjoyed his relationships with his many friends. (*Id.* at 2.) But
24 unlike Dr. Blinder, Dr. Donovan found that Search's 2008 psychometric test did not
25 accurately reflect Search's current cognitive ability because his verbal comprehension and
26 expressive abilities were not assessed. (*Id.*) From that 2008 psychometric test, Dr.
27 Donovan learned that in the third grade, Search's reasoning and memory quotients
28 clustered around the bottom of the average range/top of the low average range. (*Id.*) He

1 also found that other parts of Search's non-verbal battery show that Search was struggling
2 with internal language mediation. (*Id.*) To Dr. Donovan, these results meant that Search
3 had difficulty with language processing, which could mean that Search had a learning
4 disability. (*Id.* at 3.)

5 In April 2017, the Social Security Administration conducted an independent
6 examination on Search to determine his benefits eligibility. (*Id.*) The Social Security
7 Administration also produced a report with its findings, which Dr. Donovan used in his
8 assessment. (*Id.*) At that time, Search was in the tenth grade. (*Id.*) From that report, Dr.
9 Donovan found that Search continued to struggle academically; he had grade levels of 2.0
10 for reading skills, 2.1 for written language skills, and 3.5 for mathematics skills. (*Id.*) Yet
11 Search was described as maintaining a positive attitude toward school and having a
12 motivation to do well. (*Id.*)

13 After testing Search, Dr. Donovan found that Search's intellectual abilities show
14 him to be currently functioning in the mild level of intellectual disability. (*Id.* at 6.) After
15 administering ten basic subtests, Dr. Donovan reported that Search's IQ score was 62 on
16 the Wechsler Adult Intelligence Scale (WAIS-IV), exceeding the performance of only 1% of
17 his same aged peers. (*Id.*) However, Dr. Donovan also noted that the WAIS-IV is not
18 normed on Pacific Islanders, and that the verbal comprehension domain may be artificially
19 lowered due to cultural and language issues. (*Id.* at 6–7.)

20 Dr. Donovan ultimately concluded that Search's diagnostic condition comes closest
21 to the criteria for an intellectual disability at a mild level (previously known as mild mental
22 retardation). (*Id.* at 7.) Dr. Donovan reported that although he was confident in his
23 assessment, the information he received was often inconsistent. (*Id.*) For example, in
24 Search's 2008 psychometric test, Search scored high in the low average range in intellectual
25 tests measuring non-verbal abilities. (*Id.*) However, at that time, most of Search's academic
26 achievements pointed to an intellectual disability. (*Id.*) Dr. Donovan also learned that
27 Search was disciplined at school for various offenses. (*Id.* at 4.) But these disciplinary
28 actions against Search were incongruent with how Search was generally described. (*Id.*)

1 Dr. Donovan also addressed Dr. Blinder's findings. Dr. Donovan disagreed with
2 Dr. Blinder's conclusion that Search's intellectual disability was profound. (*Id.*) Although
3 Dr. Donovan agreed that Search has an intellectual disability, he found that Dr. Blinder's
4 findings were meritless because assessing an intellectual disability would require an
5 intelligence test, which Dr. Blinder did not administer. (*Id.* at 8.) Dr. Donovan noted that
6 people with profound mental retardation need assistance with eating, dressing, bathing, and
7 toileting. (*Id.*) Search, on the other hand, drives, is a good athlete, is socially active, and
8 can handle money. (*Id.*)

9 Dr. Donovan noted that Search's cognitive deficits are more predictive of a low
10 ceiling in terms of independent functioning and employment possibilities than they are in
11 terms of his ability to go forward with this case. (*Id.*) Dr. Donovan also noted that Search
12 shared the current allegations against him, which Search vehemently denied, stating that
13 his niece lied and that she had a problem. (*Id.* at 10.) Dr. Donovan found it important that
14 Search shared information with the police, and that Search apparently changed his position
15 from his initial confession to later proclaiming his innocence. (*Id.* at 12.) Consequently,
16 Dr. Donovan concluded that Search is fit to proceed with this case, even though he found
17 that Search may need to have the information explained to him in short and simple bits.
18 (*Id.* at 8.)

COMPETENCY HEARINGS

During the competency hearings, the Court heard from various individuals including: 1) Susan Torres (high school teacher); 2) Sheena Suares (dance group member); 3) Misako Tamata (dance group founder and sometimes employer); 4) Kyle Podziewski (high school teacher); 5) Jonathan Augon (former high school administrator); 6) David Banes; 7) Dr. Donovan; and 8) Dr. Blinder.

25 The Commonwealth argues that the testimonies and other evidence presented in the
26 competency hearings establishes that Search's intellectual disability does not prevent him
27 from standing trial. The Commonwealth argues that the evidence establishes that Search
28 possesses a rational and factual understanding of the proceedings, and that Search

1 possesses the ability to consult with his attorney with a reasonable degree of rational
2 understanding.

3 The Commonwealth refers to Search's teachers who testified that Search could
4 converse and that he could understand things if broken down step-by-step. The
5 Commonwealth also refers to Search's ability to learn the drums, learn to dance, and learn
6 new music. It also argues that Dr. Blinder's report is conclusory and contradictory because
7 Dr. Blinder claims Search does not understand guilt from innocence, yet Dr. Blinder
8 reported that Search adamantly professed his innocence.

9 The Commonwealth notes that Dr. Donovan conducted a comprehensive analysis
10 of Search's intellectual disability, finding that Search could care for himself, could be
11 employed, could drive, and could handle money. The Commonwealth also notes that Dr.
12 Donovan found that Search would respond differently depending on the person he was
13 talking with. Accordingly, the Commonwealth argues that Search cannot meet its burden
14 of proving that he is not competent to stand trial.

15 In contrast, the defense argues that Search is not competent to stand trial. In
16 support of this position, the defense argues that the lay witnesses testified consistently that
17 they are unable to make Search understand anything without having to explain it to him
18 slowly and in simple language. The defense argues that even when a subject is kept simple,
19 it must be repeated several times, over several days, before Search can understand it.

20 The defense also points to Kyle Podziewski's testimony that Search could not
21 remember, even after repeated reminders, to perform routine class assignments or to avoid
22 parking his car in the fire lane. The defense points to David Banes's testimony that if
23 anything interrupted the narrative flow in a conversation with Search, the conversation
24 would need to start over. The defense also differentiates the high school disciplinary
25 actions against Search, arguing that the disciplinary actions did not contain testimony,
26 witnesses, lawyers, cross-examination, oaths, or plea negotiations. An individual like
27 Search, the defense argues, cannot be expected to understand the rapid-fire, rapidly shifting
28 course of testimony at trial.

1 Furthermore, the defense argues that Search could not be expected to remember the
2 testimony at trial well enough to assist his attorney. And even if Search could understand
3 something, the defense argues that Search's responses could not be relied upon because
4 Search will say anything when he is uncomfortable. Moreover, the defense argues that
5 Search could not even help in deciding whether to go to trial because that would require
6 that Search weigh the pros and cons, which the defense claims Search cannot do.
7 Accordingly, the defense argues that the evidence and the testimonies presented during the
8 competency hearings prove that Search is not competent to stand trial.

FINDINGS OF FACT

Based upon the full record presented at the competency hearings, the Court makes the following findings of fact by a preponderance of the evidence:

- 12 1. The Court finds that Search suffers from a mild intellectual disability. In reaching
13 this conclusion, the Court gives great weight to Dr. Blinder's findings, Dr.
14 Donovan's findings, the Social Security Administration's report, and the Court's
15 own observation of Search throughout the competency hearings.

16 2. The Court finds that Search has an adequate capacity to understand the criminal
17 proceedings against him. Although Search may have an intellectual disability,
18 Search fervently proclaimed his innocence to Dr. Blinder and Dr. Donovan, and he
19 claimed the victim lied and that she has a problem. Dr. Donovan also reported that
20 Search understood that he would have an attorney present with him during the
21 proceedings. As a result, the Court believes that Search understands the criminal
22 proceedings against him.

23 3. The Court finds that Search has an adequate capacity to consult with his attorneys
24 with a reasonable degree of rational understanding to assist in his defense. Several
25 testifying witnesses, including Search's previous attorney, explained that Search can
26 understand things when expressed in small chunks. Although the defense believes
27 this proves Search cannot assist his attorney, the Court finds it will not significantly

1 impair Search's ability to assist his attorneys. The way Search processes information
2 will require patience from his attorneys.

- 3 4. The Court finds that Search understands the nature and severity of the charges
4 against him. Search insisted during his conversations with Dr. Blinder and Dr.
5 Donovan that he was innocent and that he would not do anything to hurt others.
6 Dr. Donovan also reported that Search confessed to the police before changing his
7 account of the events. This leads the Court to conclude that Search understands the
8 implications of the charges against him.
- 9 5. The Court finds that Search has an adequate capacity to communicate facts, events,
10 and states of mind to his attorneys. Search provided the police a detailed
11 explanation of the events that led to this action. Although Search later professed his
12 innocence, the Court finds that Search can adequately communicate facts and
13 events.
- 14 6. The Court finds that Search has an adequate capacity to understand the possible
15 penalties which could result from conviction on the charges against him. Again,
16 Search confessed to the police then later professed his innocence to Dr. Blinder and
17 Dr. Donovan. Search also accused the victim of lying and claimed she had a
18 problem. Accordingly, Search appears to understand the possible results from a
19 conviction on the charges against him.
- 20 7. The Court finds that Search has an adequate capacity to engage in behavior which
21 will allow the Court to proceed. Throughout the hearings, Search was not
22 disruptive but rather quiet. Therefore, the Court believes it can proceed with this
23 case without interruptions.
- 24 8. The Court finds that Search's mental disorder has no appreciable impact on the
25 nature of the quality of his relationship with his lawyers. Search appears to work
26 well with his lawyers. And although his lawyers need to explain things to Search in
27 simple language, the Court does not believe this will have an appreciable impact on
28 the quality of Search's defense.

CONCLUSIONS OF LAW

Based upon the foregoing, the Court concludes the following as a matter of law:

CONCLUSION

Based upon the findings of fact and conclusions of law set forth above, the Court finds that Search has not carried out his burden of demonstrating by the preponderance of the evidence that he is not competent to stand trial.

Ordered this 8th day of January 2020.

KENNETH L. GOVENDO
Associate Judge