

**VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH**

COMMONWEALTH OF VIRGINIA,

v.

WILL PATTERSON, JR.,

Defendant,

Case No: CR17-1383

**FINAL ORDER**

In the above styled case, comes now the Defendant, Will Patterson Jr., to be heard upon the MOTION TO VACATE AND SET ASIDE THE VERDICT filed by the Defendant's counsel, Brenda C. Spry, Esq. and Lakishi D. Stevenson, Esq.

The instant motion is styled as a Motion to Vacate and Set Aside the Verdict. On April 13, 2018, Defendant was convicted of Attempted Capital Murder, Malicious Injury to Law Enforcement Officer, four (4) counts of Shoot in Public with Bodily Injury, two (2) counts of Use of a Firearm in the Commission of a Felony, Carry Concealed Weapon, and Possession of Firearm by a Minor. Defendant was convicted by a jury after pleading not guilty. Defense counsel now alleges that Defendant was incompetent at the time of the trial, and that they were made aware of his mental health issues subsequent to the jury verdict but prior to sentencing.

In the summer of 2018, Defendant was evaluated by Dr. Weare A. Zwerner, Ph.D. and Dr. Lena S. Kessler, Ph.D. Both doctors determined that Defendant was incompetent to stand trial, and the Honorable Judge Moore found that Defendant was incompetent to be sentenced on October 18, 2018. He ordered that Defendant undergo restoration services, and Dr. Margaret A. Fahy, Ph.D. determined that Defendant was competent to be sentenced on February 20, 2020.

Specifically, Defendant contends that because he was incompetent throughout all stages of trial preparation, as well as throughout all stages of trial, his right to due process and his right to effective assistance of counsel were violated. The Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial. Due process requires that states provide criminal defendants access to procedure for making a competency evaluation. *Dang v. Commonwealth*, 287 Va. 132 (2014). The standard articulated by the U.S. Supreme Court is “whether the defendant has ‘sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding’ and has ‘a rational as well as factual understanding of the proceedings around him.’” *Dusky v. States*, 362 U.S. 402 (1960). Each of the three aforementioned doctors provided reports and testimony that Defendant’s incompetence was due to “developmental immaturity” and that it would be impossible for Defendant to have been competent before and during his trial. These doctors affirmed Defendant’s incompetence during his trial at a hearing on August 7, 2020. The due process right to competence during trial is not subject to waiver, and the expert testimony that Defendant did not understand his trial and was unable to assist his counsel deeply concerns the Court.

Defendant’s counsel did not raise the issue of his competency until after the trial. This failure to request an evaluation prior to trial cannot be waived. *McLaughlin v. Royster*, 346 F. Supp. 297 (1972); *Pate v. Robinson*, 383 U.S. 375, 384 (1966). “[A]lthough the right to assistance of counsel may be waived like most constitutional rights . . . the waiver and the plea itself may be impeached by a showing of the defendant’s incompetency. *Thomas v. Cunningham*, 313 F.2d 934 (1963). It is clear from the three experts’ reports and testimony that Defendant took until February 20, 2020 to show competency, and that he was not developmentally mature enough to assist in his own defense during the April 2018 trial. A defendant unable to assist in

the preparation of his defense cannot equip his lawyer to be effective on his behalf, and the failure of Defendant's attorneys to adequately investigate their client's mental state and insist on a competency evaluation constitutes a violation of Defendant's right to effective assistance of counsel.

The Court, having thoroughly considered the Motion and upon review of this case and the applicable law, determines that Defendant was not competent during his trial, and that his right to due process and right to effective assistance of counsel were violated. Defendant's Motion to Vacate and Set Aside the Verdict is **GRANTED** and a new trial is ordered.

Pursuant to Rule 1:13 the endorsements of counsel are waived and a copy of this order shall, upon entry, be mailed to Defendant at his listed address.

It is so **ORDERED**.

ENTERED this 21<sup>ST</sup> day of September, 2020.

  
The Honorable William S. Moore, Judge  
Portsmouth Circuit Court

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C YVITINA P. MORRISON  
CIRCUIT COURT CLERK