

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED

STATE OF OHIO

2009 NOV 30 A 9 43

JUDGE KATHLEEN ANN SUTULA

Plaintiff

GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

CASE NO. CR 502443

vs

LONNIE DONALDSON

OPINION

Defendant

Kathleen Ann Sutula, J:

Defendant, Lonnie Donaldson, filed a Motion to Dismiss the Capital Components of the Indictment pursuant to *Atkins v. Virginia* (2002), 536 U.S. 304.

The Ohio Supreme Court, addressing the issue in *State v. Lott* (2002), 97 Ohio St. 303, set forth the substantive and procedural guidelines to follow in determining mental retardation. The Court placed the burden on the defendant to establish, by a preponderance of the evidence, that he is mentally retarded.

The *Lott* decision adopted the clinical definitions of mental retardation from the American Association of Mental Retardation and the American Psychiatric Association requiring:

- 1) Significantly sub-average intellectual functioning;
- 2) Significant limitations in two or more adaptive skills; and
- 3) Onset before the age of 18.

The *Lott* court further held that there is a rebuttable presumption that a defendant is not mentally retarded if his or her I.Q. is above 70.

The defense presented Dr. John M. Fabian as its only witness. Dr. Fabian's qualifications as an expert in the field of psychology were stipulated. His credentials and experience justify the stipulation and this Court's finding Dr. Fabian qualified as an expert.

Dr. Fabian's report, which is 19 pages, included 5 tests administered to Mr. Donaldson.

CR07502443-A

60552063



On January 18, 2008, Dr. Fabian administered the WAIS-III to Mr. Donaldson which yielded a verbal I.Q. of 75, performance I.Q. of 79, and full scale I.Q. of 75. On June 2, 2009, the WAIS-IV administered by Dr. Fabian yielded similar results of Verbal Comprehension, 72; Perceptual Reasoning, 69; Working Memory, 74; Processing Speed, 89; and full scale, 71.

Sometime shortly after the WAIS-IV, Dr. Fabian administered tests to determine whether Mr. Donaldson was malingering, or not putting forth appropriate effort. The TOMM test was administered to assess for memory malingering and cognitive effort. The results indicated, in Dr. Fabian's opinion, that Mr. Donaldson "likely did not exhibit ideal or full cognitive effort on this examination." However, a score of 38 is well below the score of 45 which the authors of the TOMM test indicate is indicative of malingering. The Word Memory Test (WMT) was also administered to indicate effective effort measure. These results included: Immediate Recognition, 93%; Delayed Recognition, 93%; Consistency, 85%; Multiple Choice, 70%; Paired Associate Recall, 60%; Free Recall, 43%; and Long Delay Free Recall, 38%. Dr. Fabian reported that Mr. Donaldson's scores fall in the clear pass range on 2 sub-tests and in the caution range on the Consistency sub-test.

The final test discussed in the report, the Woodcock Johnson Tests of Academic Achievement place Mr. Donaldson in the 4th grade level of academic skills with a score of approximately 79.

Dr. Fabian opined that Mr. Donaldson functions in the mild mental retardation range even though all of his test results are above the cut off score of 70 used by most state statutes. Not one of Mr. Donaldson's tests fell below 71 on the full scale.

Dr. Fabian administered the SIB-R to Mr. Donaldson's mother, two sisters, and former girlfriend with whom Mr. Donaldson lived. Dr. Fabian admitted that all collateral informants were biased and further that the girlfriend's responses were, in numerous instances, not worthy of belief.

The lowest score from any of the credible sources was in the Community Living Skills domain. The sub-tests of this domain, which the sources reported that Mr. Donaldson had rarely, if ever, attempted to utilize, included balancing and using savings and checking accounts, saving sales receipts, paying bills, using credit cards, and managing loans. In all of the other domains, Mr. Donaldson scored higher. Thus, it is clear to this Court that Mr. Donaldson is significantly limited in the area of Community Living.

Although Dr. Fabian opines that he finds Mr. Donaldson to be operating in the mild mental retardation range, he found it "unclear" as to whether Mr. Donaldson qualified for that range prior to age 18. Further, it appears to this Court, having reviewed all exhibits, the law, numerous reports and tests, and having listened attentively to Dr. Fabian's testimony, that Mr. Donaldson may, indeed, have restrained his effort on, at a minimum, some of the tests administered.

In summary, the Court finds that the testimony of Dr. Fabian does not overcome the presumption that a "defendant is not mentally retarded if his or her I.Q. is above 70." Moreover, the Court finds no evidence that the onset age was prior to age 18 and, further, that this Defendant is not significantly limited in two or more adaptive skills.

Based upon these findings, the Defendant's Motion and Supplemental Motion to Dismiss the Capital Components of the Indictment Due to Atkins Claim are denied pursuant to *Atkins v. Virginia* and *State v. Lott*.

IT IS SO ORDERED.

Date: 11.24.09

K. A. Sutula
Judge Kathleen Ann Sutula

SERVICE

A copy of this Opinion was sent by regular U.S. mail this 24 day of November, 2009,
to the following:

Blaise Thomas, Esq.
Assistant County Prosecutor
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, OH 44113
Attorney for Plaintiff

Thomas Rein, Esq.
Leader Building, Suite 940
526 Superior Avenue
Cleveland, OH 44113
Attorney for Defendant



Judge Kathleen Ann Sutula