

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

STATE OF OHIO)	CASE NO. CR 12 568808
)	
Plaintiff,)	JUDGE JOHN P. O'DONNELL
)	
vs.)	
)	
ROBERT M. PENNINGTON)	<u>JOURNAL ENTRY</u>
)	
Defendant.)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

Robert M. Pennington was indicted on November 13, 2012. There are eight counts in the indictment: two for aggravated murder (counts 1 and 2), aggravated robbery (3), aggravated burglary (4), kidnapping (5), murder (6), and two counts of felonious assault (7 and 8). The named victim for each count is Roy F. Rose and all of the offenses were allegedly committed on November 1, 2012, at 6609 Madison Avenue in Cleveland.¹ Sometime between then and arraignment on November 26, 2012, the defendant was arrested in Tennessee and returned to Ohio for arraignment, where he was deemed indigent and defense counsel was assigned.² He has been in the Cuyahoga County jail since arraignment on a \$5,000,000 bond.

On November 28 and December 3, 2012, the defendant filed requests for discovery and a bill of particulars. Before formal responses to those requests were provided by the state, the defendant, on January 16, 2013, waived his speedy trial rights through April 16, thus tolling the counting of days for statutory speedy trial during that time period. By an entry dated February 15 a jury trial was scheduled for May 6. But on May 1 a pre-trial conference was convened by

¹ See the bill of particulars, filed April 11, 2013.

² See the November 26, 2012, entry of arraignment, which contains the notation "extradited from Tennessee."

the court upon the oral request of counsel. The defendant was not present at that conference, and the court was informed that he had been taken from the jail to MetroHealth Medical Center in Cleveland for an unspecified medical emergency. He was still in the hospital on May 6 and the trial was continued, at his implicit request, until he was out of the hospital.

At a status conference on May 29 – attended by the defendant, who was no longer in the hospital by then – the defendant’s counsel made an oral motion for an indefinite trial continuance for the reason that he is physically unable to be present at, and meaningfully participate in, a trial. The oral motion was couched in the language of competency to stand trial but defense counsel did not assert that it was a mental illness or other psychological or psychiatric condition that prevented Pennington from undergoing a trial. Nevertheless, the court considered that the oral motion “raised” the question of competency under section 2945.37(B) of the Ohio Revised Code and, on the court’s own motion pursuant to R.C. 2945.371(A), referred Pennington to be evaluated for competency to stand trial by the court psychiatric clinic and a competency hearing was set for July 16. In the meantime, on June 7, the defendant filed a written motion for a continuance. Attached to the motion were 747 pages of the defendant’s medical records. The great majority of the records are from MetroHealth but they also include some May 2013 records from the jail infirmary.

The hearing was held on July 16 and this entry follows.

LAW AND ANALYSIS

The defendant’s written motion is explicitly for a continuance of the trial on the grounds of his physical condition but, like the oral motion on May 29, alludes to his mental competence to stand trial. For example, Pennington argues in his June 7 motion that his “medical conditions preclude him from being physically able to attend and participate in his trial and

subsequently aid in his own defense.”³ He goes on to explain that he is taking “medications that interfere with his ability to concentrate and participate and aid in his own defense”⁴ and that it will be “impossible for him to be physically present in court.”⁵ It is thus necessary to determine the defendant’s competence to stand trial in connection with deciding the merits of the motion for a continuance.

Competence to stand trial

R.C. 2945.37(G) provides that if a preponderance of the evidence shows that, because of a present mental condition, a defendant is incapable of understanding the nature and objective of the proceedings against him or of assisting in his defense, the court shall find the defendant incompetent to stand trial. Furthermore, under that same section, a defendant is presumed competent to stand trial. Hence, if no evidence of Pennington’s present mental condition is offered then he must be found competent.

Although the defendant was evaluated by Karl E. Mobbs, M.D. of the court psychiatric clinic, Dr. Mobbs’s testimony was not presented at the hearing by either party and Pennington objected to the state’s suggestion to stipulate to the opinions in Mobbs’s written report.⁶ The only evidence admitted at the hearing are the medical records attached to the motion for a continuance. The defendant cannot point to any evidence in those records to support a finding that a “present mental condition” prevents Pennington from understanding the nature and objective of the proceedings against him or of assisting in his defense.

³ Defendant’s June 7 motion for a continuance, page 2.

⁴ *Id.*

⁵ *Id.*

⁶ Contrary to the defendant’s assertion at the hearing, it is not the court’s responsibility to arrange for and call witnesses at the hearing. See R.C. 2945.37(E): The prosecutor and defense counsel may submit evidence on the issue of the defendant’s competence to stand trial.

Therefore, based upon all of the available evidence, the defendant is competent to stand trial.

Motion for a continuance

As summarized above, the defendant asserts that he simply cannot endure a trial because of the state of his physical health.

As also noted above, there is no testimonial evidence about his medical condition.

The documentary evidence includes a May 10, 2013, review of Pennington's medical history by Dina M. Scott of MetroHealth.⁷ The review was done while the defendant was admitted to MetroHealth for cellulitis or a possible staph infection in his right leg and notes leg and scrotal swelling with pain that is "managed well" on medication, including antibiotics. The review lists other diagnoses for Pennington, including: hepatitis C, cirrhosis of the liver, pancytopenia (a blood cell deficiency), and acute kidney injury.

Other records describe: a July, 2012, emergency department visit for right foot and ankle pain after falling from a ladder seven months before; a December 4, 2012, admission for a possible right pelvic fracture after falling while walking with a cane; a January 30, 2013, admission for right upper quadrant pain where Pennington was discharged on February 1 without restrictions; the April 26 through May 10, 2013, admission for the probable staph infection; and a May 14, 2013, hospital visit, apparently for congestive heart failure.

Although these numerous conditions are no doubt serious, nowhere in the records is there a suggestion that any of Pennington's doctors are of the opinion that he cannot adequately participate in a trial.

In evaluating a motion for a continuance, a court should consider: the length of the delay requested; whether other continuances have been requested and received; the

⁷ Pages 13-15 of the third .pdf file admitted as evidence.

inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case. *State v. Unger*, 67 Ohio St. 2d 65, 67-68 (1981). The lack here of any opinion evidence to assist in the interpretation of the documentary evidence prevents a meaningful consideration of some of these factors. For example, although there is ample evidence that the defendant does have the conditions outlined in his medical history, there is no evidence that the conditions will, as he claims, prevent him from trial participation, thereby precluding a factual determination about whether the continuance is sought solely to preserve Pennington's right to a fair trial or is "dilatory, purposeful or contrived."

Other factors weigh against Pennington. He is asking for an indefinite continuance while suffering from at least two diseases – hepatitis C and cirrhosis of the liver – that, as far as the court is aware, do not get better. So, even though he hasn't made this argument expressly, as a practical matter he is asking that the case never be brought to trial. While he is presumed innocent it is also true that the grand jury hearing the evidence in this case found probable cause to believe Pennington committed the charged offenses. The state, although not a beneficiary of the individual constitutional protections afforded to the defendant, is entitled to a fair opportunity to meet its burden of proving its claims beyond a reasonable doubt. Moreover, there are no statutory provisions for the court's continuing jurisdiction over, or the dismissal of an indictment against, or the civil commitment of, a defendant who is physically unable to be tried as there are under R.C. 2945.39 for a defendant mentally incompetent to stand trial. Additionally, Pennington has already been granted a continuance that, as of the date of this

entry, amounts to nearly three months and he is no more able to identify when he will be capable of attending a trial than he was on May 6.

Pennington's motion for a second evaluation

At the conclusion of the July 16 hearing Pennington's counsel made an oral motion that the defendant be examined at the state's expense by a medical doctor for an opinion on his physical ability to participate in a trial. Pennington did not suggest a particular doctor for this evaluation. He also made this request after declining to call Dr. Mobbs of the court clinic – a medical doctor – or any of his treating physicians as witnesses. That tactical decision supports an inference that those witnesses would not have provided the “strong medical evidence showing his conditions preclude him from being able to attend”⁸ and participate in a trial.

Due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution, requires that an indigent criminal defendant be provided funds to obtain expert assistance at state expense only where the defendant has made a particularized showing (1) of a reasonable probability that the requested expert would aid in his defense, and (2) that denial of the requested expert assistance would result in an unfair trial. *State v. Mason*, 82 Ohio St. 3d 144 (1998), syllabus. Given that Pennington is unable to produce a witness to support his contentions from among the several physicians who have examined him or consulted on his care over the past several months, including Dr. Mobbs, he has not shown a reasonable probability that a new expert would support his position. He has also failed to produce evidence that a denial of the requested expert assistance will result in an unfair trial.

⁸ Defendant's June 7 motion, p. 7-8.

CONCLUSION

Because Pennington has not produced evidence: 1) overcoming the presumption that he is mentally competent to stand trial; 2) to support his contention that he “is not physically well enough to attend the trial”⁹; and 3) of a particularized need for expert assistance, his written motion for an indefinite continuance and his oral motion for an expert evaluation at the state’s expense are denied and a trial date will be set by a separate entry.

IT IS SO ORDERED:

Judge John P. O’Donnell

Date: _____

⁹ *Id.*, p. 6.

SERVICE

A copy of this journal entry was sent by email, this _____ day of July, 2013, to the following:

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