Right to Presence of Counsel During an Insanity Defense Evaluation

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Psychiatric Evaluation by State Expert Is Not a "Critical Stage" of Legal Proceedings

In *Cain v. Abramson*, 220 S.W.3d 276 (Ky. 2007), the Supreme Court of Kentucky examined whether a defendant who is asserting an insanity defense has the right to have counsel present during a court-ordered psychiatric evaluation to assess criminal responsibility.

Facts of the Case

Michael Cain was present before the Jefferson Circuit Court in the Commonwealth of Kentucky, facing charges on three counts of first-degree robbery and second-degree persistent felony offender status. He filed notice of his intention to assert the defense of not guilty by reason of insanity on February 21, 2006. The Commonwealth responded with a motion to have Mr. Cain evaluated as to his criminal responsibility by the Commonwealth's expert psychiatrist. The motion was granted on April 3. On April 5, Mr. Cain informed the Commonwealth that he wanted his counsel to be present during the psychiatric examination, asserting his Sixth Amendment right. The Commonwealth in turn filed a motion to disallow his counsel's presence during his psychiatric examination. After hearing arguments on April 11, the circuit court granted the Commonwealth's motion to have Mr. Cain's counsel excluded from the psychiatric examination. It did, however, allow Dr. Allen (a psychiatrist at the Kentucky Correctional Psychiatric Center) to be present on his behalf to observe the evaluation.

The circuit court granted a stay of the psychiatric examination on April 17, to allow Mr. Cain to file an action in the court of appeals. Mr. Cain petitioned the appellate court to issue a writ of prohibition that, if granted, would have prevented the circuit court from proceeding with the psychiatric examination as ordered (i.e., without counsel present). The petition was denied by the court of appeals on June 2. Subsequently, Mr. Cain appealed the denial to the Supreme Court of Kentucky.

Ruling and Reasoning

The Supreme Court of Kentucky affirmed the decision of the court of appeals and denied Mr. Cain's petition for a writ of prohibition to prevent the trial court from ordering a psychiatric evaluation without his counsel present.

In support of his contention that a writ of prohibition is the appropriate remedy in this case, Mr. Cain presented three arguments: that he had no adequate remedy by appeal or otherwise and, if denied, he would suffer great injustice and irreparable injury; that his Fifth Amendment rights were not adequately protected; and that he had a constitutional right under the Sixth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution to have counsel present during the psychiatric evaluation.

In response to Mr. Cain's first argument, the court noted that it regards a writ of prohibition as an "extraordinary remedy" and had previously held that a writ would only be issued in cases in which "the lower court is acting or is about to act erroneously . . . and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted" (*Cain*, p 278). When considering the current case, the court concluded that a writ of prohibition was not necessary because Mr. Cain had an alternate remedy available to him: he could have the evaluation observed by his own expert, as is allowed by the Kentucky statute that outlines the procedure for psychiatric evaluations for criminal responsibility (Ky. Rev. Stat. Ann. § 504.080(5)). Because the trial court allowed Dr. Allen to observe the evaluation on Mr. Cain's behalf, the supreme court reasoned that Mr. Cain had an adequate remedy, and therefore a writ of prohibition should not be issued.

Mr. Cain next argued that his right not to "be compelled in any criminal case to be a witness against himself" (U.S. Constitution, Amendment 5) would not be adequately protected without the presence of

counsel during the psychiatric examination. The Kentucky statutes already provide some protection against self-incrimination during a psychiatric examination of criminal responsibility:

> No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, shall be admissible into evidence against the defendant in any criminal proceeding. No testimony by the expert based upon such statement, and no fruits of the statement shall be admissible into evidence against the defendant in any criminal proceeding except upon an issue regarding mental condition on which the defendant has introduced testimony [Ky. R. Crim. P. 7.24(3)(B)(ii) (2008)].

Mr. Cain asserted, however, that this protection was inadequate. In support of his contention, he referenced *Powell v. Graham*, 185 S.W.3d 624 (Ky. 2006), a case in which the Kentucky Supreme Court issued a writ of prohibition to prevent the trial court from compelling the defendant to submit to a mental health evaluation without first taking steps to protect his Fifth Amendment rights. The *Cain* court noted that the facts of *Powell* were sufficiently different because the psychiatric evaluation in that case was ordered for a purpose other than to assess criminal responsibility, and its holding did not apply to the current case. The court concluded that the safeguards against self-incrimination outlined in Ky. R. Crim. P. 7.24(3)(B)(ii) were adequate to protect a defendant who had voluntarily put his mental health at issue as part of an insanity defense, and therefore the extraordinary measure of issuing a writ of prohibition was unnecessary.

Lastly, Mr. Cain claimed that denial of his petition for a writ would violate his Sixth Amendment right to be represented by counsel during his psychiatric evaluation during a "critical stage" of the legal proceedings. The court disagreed with this claim and described two criteria that define a critical stage (*U.S. v. Byers*, 740 F.2d 1104 (D.C. Cir. 1984)): (1) a situation in which the defendant has "to make a decision requiring distinctively legal advice," or (2) when the defendant has "to defend himself against the direct onslaught of the prosecutor" (*Byers*, p 1118). Based on these criteria, the court rejected Mr. Cain's argument that the psychiatric evaluation is a critical stage of the proceedings. It noted that a psychiatrist is not a legal adversary, regardless of who has hired him and that a psychiatric evaluation would require Mr. Cain to make "no decisions in the nature of legal strategy or tactics—not even . . . the decision whether to refuse, on Fifth Amendment grounds, to answer the psychiatrist's questions" (*Cain*, p 280). Furthermore, the court recognized that the psychiatric examination is "informal and unstructured by design" (*Byers*, p 1120) and could be seriously disrupted if counsel were allowed to interpose objections, redirect the course of the examination, or limit the scope of inquiry. Thus, the court held that there is no Sixth Amendment right of a defendant to have counsel present during a psychiatric examination to assess criminal responsibility.

Discussion

This case presents several interesting points for discussion. First, the court opined that the defendant was confronted by the legal system only up to the point at which he had to decide his defense strategy. Once he had made the choice to raise the insanity defense, the court reasoned that he no longer needed to make any decisions that required legal expertise, and the ensuing psychiatric examination therefore was not a critical stage of the proceedings. This holding is in contrast to the U.S. Supreme Court's stance on psychiatric examinations for competence to stand trial, where counsel is allowed to be present because the Court views this as a critical stage in which a defendant is entitled to full Sixth Amendment protection (*Estelle v. Smith*, 451 U.S. 454 (1981)). The Kentucky Supreme Court appears to be making a distinction between different types of psychiatric examinations during a criminal proceeding, allowing counsel to be present at some types of examinations, but not others.

Next, the court clarified that a psychiatrist, irrespective of hiring agency, is not functioning in an adversarial capacity when performing his examination. It also highlighted how the presence of counsel can seriously disrupt the examination process, even if counsel were to be an observer sitting outside the room. Further, the court hinted that the exclusion of counsel during such an examination was, in fact, necessary to conduct a proper psychiatric evaluation. This ruling can be construed as a vote of confidence in the objectivity and independence of a forensic psychiatric examination.

However, the court referred to the psychiatric examination process as informal and unstructured. A psychiatric evaluation for defendants raising the insanity defense is a meticulous process with clearly defined ethical and methodological parameters, as has been emphasized in the AAPL Practice Guide-

lines (*J Am Acad Psychiatry Law* 30(Suppl 2):S3–40, 2002). It could be argued that, compared with attorneys, forensic psychiatrists ask more open-ended questions, but this does not necessarily equate with informality. It is therefore perhaps somewhat hasty and unjust for the court to dismiss the exercise as informal and unstructured.

Post-traumatic Stress Disorder, Employment Discrimination, and Direct Threat Claims

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An Employee With Post-traumatic Stress Disorder May Be Terminated if Symptoms Pose a Direct Threat and Cannot Be Reasonably Accommodated

In *Jarvis v. Potter*, 500 F.3d 1113 (10th Cir. 2007), the U.S. Court of Appeals for the Tenth Circuit considered whether the trial court had erred when granting summary judgment in favor of the United States Postal Service (USPS) in a discrimination and retaliation suit by a postal worker with post-traumatic stress disorder. The appeals court affirmed the decision on the disability claim that the plaintiff was not a "qualified individual" because he posed a "direct threat" that could not be reasonably accommodated.

Facts of the Case

Lanny Bart Jarvis was a Vietnam veteran who had worked for the U.S. Postal Service as a mail handler and subsequently as a custodian. He had received a diagnosis of post-traumatic stress disorder in the late 1990s, and in 2002 he began to have difficulties at his workplace due to PTSD. After being startled twice by one co-worker, on two separate occasions he respectively "struck" and kicked her inadvertently; on another occasion he clenched his fist when startled by his supervisor. According to Mr. Jarvis, he also asked the supervisor to tell his co-workers that he had PTSD and that they should avoid "scaring" him; they should speak to him in a normal tone of voice and not approach him from behind. Neither his co-worker nor his supervisor reported these incidents.

A third incident led to the investigation that ultimately resulted in Mr. Jarvis' termination from the Postal Service. One witness said that Mr. Jarvis was obtaining a key to fix a mail truck when a co-worker "goosed or poked" (*Jarvis*, p 1118) him, whereupon he hit the co-worker's shoulder, and the co-worker reported the incident. During a deposition, Mr. Jarvis described his intentions more ominously and dramatically: "*I was ready to kill the guy*" (*Jarvis*, p 1117; emphasis in original). A witness described the incident as a "so-what deal" (*Jarvis*, p 1118).

The third incident led to an investigation resulting in Mr. Jarvis' being placed on leave with pay and almost immediately thereafter without pay. Mr. Jarvis appealed this decision, and the Postal Service held a "due process meeting" at which he reported that "if he hit someone in the right place, he could kill him," that his PTSD was worsening, that he "c[ould] no longer stop the first blow," and that he "could not safely return to the workplace" (*Jarvis*, p 1118). He also requested that his supervisor pursue disability retirement for him and offered to have his treating nurse practitioner, Sonia Hales, send a letter explaining the significance of his PTSD. As part of her letter, Ms. Hales stated that she had reviewed his prior treaters' records, which noted the severity of his symptoms, and that because of his PTSD, he "may pose some threat in the work place." She stated further that, given that he had identified his work as a "significant stressor in his life, . . . a medical retirement may be beneficial for him" (*Jarvis*, p 1119). He was then sent a letter of termination based on the incidents with the first and third co-workers, his assertions at his due process hearing, and his treater's letter. He then filed discrimination and retaliation complaints with the Equal Employment Opportunity (EEO) office. He also asked for accrued sick leave and vacation time, which he was denied. He was then sent a letter offering him the opportunity to resign should he do so by a certain date and without the condition that he receive disability retirement. (He ultimately received disability retirement.)

Mr. Jarvis sued the USPS in the district court for the District of Utah, alleging that it had violated the Vocational Rehabilitation Act (VRA), 29 U.S.C.S. § 701 et seq. (2006), and had retaliated against him for