

CA No. 04-99003

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * *

TERRY JESS DENNIS, by and
through KARLA BUTKO, as Next
Friend,

Petitioner-Appellant,

v.

MICHAEL BUDGE, Warden, and
BRIAN SANDOVAL, Attorney
General of the State of Nevada

Respondents-Appellees.

D.C. No. CV-S-04-0798-PMP-RJJ
(Nevada, Las Vegas)

Appeal from the United States District Court
for the District of Nevada

APPELLANT'S REPLY BRIEF

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_____Petitioner-Appellant Terry Jess Dennis, through next friend Karla Butko, submits the following reply to the answering brief filed by Respondents-Appellees.

I. INTRODUCTION.

Much of the respondent's answering brief is devoted to general propositions of law with which appellant does not take issue, or to countering arguments that appellant has not made. Initially, it may be useful to clarify what is in dispute and what is not.

1. Appellant does not dispute that Mr. Dennis has the intellectual capacity to understand his situation, an issue that has been characterized as the second element of the competence inquiry under Rumbaugh v. Procnier, 753 F.2d 395, 398 (5th Cir. 1985). XI ER 1827. Dr. Bittker found this in his report and so testified in the district court. X ER 1602, XI ER 1854-1856, 1858.

2. The state does not appear to dispute that Mr. Dennis does in fact suffer from mental disorders. The evidence that Mr. Dennis suffers from mental disorders of long standing is clear and uncontradicted. See App. Opening Br. at 6 and n. 2.

3. The state argues that the fact that an individual does suffer from a mental disorder does not mean that he is incompetent to seek execution. Resp.

Ans. Br. at 30-31. Appellant does not argue to the contrary: while the existence of a mental disorder is a necessary condition of finding incompetence, it does not establish incompetence by itself. See Rumbaugh, 753 F.2d at 398. Thus appellant does not dispute the authorities cited by respondents, Resp. Ans. Br. at 30-31, which stand for this proposition. Rather, the question is whether the disorder “substantially affects” the person’s ability “to make a rational choice with respect to continuing or abandoning further litigation....” Rees v. Peyton, 384 U.S. 312, 314 (1966) (per curiam).

4. Appellant does not dispute, and acknowledged in the district court, that Mr. Dennis has not consented to the filing of the next friend petition, and that he, in fact, opposes it. XI ER 1815. The issue is not whether Mr. Dennis has not consented to the next friend litigation, but whether he is competent under the Rees standard to abandon further litigation on his behalf.

In light of these undisputed issues, appellant turns to the issues in question.

II. THE UNCONTRADICTED EXPERT EVIDENCE DEMONSTRATES THAT MR. DENNIS IS INCOMPETENT UNDER THE REES v. PEYTON TEST BECAUSE HIS DECISION TO SEEK EXECUTION IS THE PRODUCT OF HIS MENTAL ILLNESS RATHER THAN OF HIS OWN VOLITION.

Appellant showed in the opening brief that the only evidence before this Court demonstrates that Mr. Dennis’ decision to seek execution is “substantially

affected” by his mental disorder and thus he is not competent under the standard of Rees v. Peyton. App. Opening Br. at 11, 13. The state respondents do not appear to contest that Dr. Bittker was the only psychiatrist who examined Mr. Dennis who specifically assessed whether he was competent to abandon further litigation. The state also does not appear to contest that Dr. Bittker testified before the district court that Mr. Dennis wanted to make the state “his vehicle for suicide,” that his “fixed idea that he should die” is “a product of his mental disorder” and that Mr. Dennis’ decision is not a “volitional decision.” XI ER 1857-1859. Indeed, the state does not discuss or even mention this unequivocal and uncontradicted testimony.

Instead, the state suggests that Mr. Dennis is not incompetent just because he is suicidal. Resp. Ans. Br. at 32. Assuming that the state’s position could be valid (if the suicide wish is not the product of a mental illness), that argument has no weight here because the only evidence before this Court is that Mr. Dennis’ suicide wish is “a product of a mental disorder.” ER 1857.¹

The state also argues that Dr. Bittker did not really testify that Mr. Dennis was incompetent because he “avoided” answering the third inquiry under

¹Dr. Bittker also made it clear under cross-examination that he did not believe that an individual would necessarily be suicidal only because he wanted to “drop his appeals.” XI ER 1861.

Rumbaugh, that is, whether Mr. Dennis’ mental disorder would “prevent him from making a rational choice among his options.” Rumbaugh, 753 F.2d at 398. Resp. Ans. Br. at 24. Dr. Bittker testified “I don’t think it’s a volitional decision,” XI ER 1858, and appellant submits that the doctor’s testimony that the decision to seek execution is “a product of his disorder,” XI ER 1857-1859, could not be clearer. The state’s position is simply groundless.

The state contends that appellant’s argument is that lay judges could never make decisions on the competence of a person seeking execution. Resp. Ans. Br. at 23-24. This, of course, is not the argument. It is clear that expert testimony is critical in resolving the issue of competence. See Mata v. Johnson, 21 F.3d 324, 327-328, 330-331 (5th Cir. 2000). Courts resolve most cases by determining which among competing expert opinions is most persuasive. See, e.g., Vargas v. Lambert, 159 F.2d 1161, 1170-1171 (8th Cir. 1998), stay vacated, 525 U.S. 925 (1998); id. at 1174-1176 (Kleinfeld, J., dissenting). In this case, however, there are no competing opinions; only Dr. Bittker was asked for an opinion on Mr. Dennis’ competence to seek execution. Dr. Bittker’s opinion was that Mr. Dennis’ decision was “directly a consequence” of his mental illness. The state courts did not make any adverse credibility findings with respect to Dr. Bittker’s evidence, but instead allowed themselves to be misled by Mr. Dennis’ apparent lucidity without

obtaining the expert guidance that they needed to assess it adequately.

In fact, the state district court initially recognized the importance of expert assistance, when it acknowledged “that none of us in this room are licensed physicians or psychologists or persons ... who can answer the question the Supreme Court put to the court, so ... we need to do a little bit more work ... [W]e probably need somebody with specialized education...” II Resp. ER 359-360. But when the court received Dr. Bittker’s report, it simply ignored his relevant conclusion, and did not seek his testimony to assist in assessing the meaning of Mr. Dennis’ demeanor or to clarify his report, although it did not make any adverse finding as to the credibility of his report. IX ER 1620-1621, 1655-1660.

Similarly, in the federal proceedings, the district court heard Dr. Bittker’s testimony unequivocally concluding that Mr. Dennis’ decision was a product of mental illness, and explaining that his apparently lucid demeanor was not inconsistent with his decision being under the control of his mental illness. Again, the district court did not make any adverse credibility finding as to Dr. Bittker’s critical testimony, XI ER 1889-1903, and there was no contradictory evidence, but the court nevertheless ignored it in relying upon the presumption of correctness.

In the circumstances of this case, there is simply no basis in the evidence for rejecting Dr. Bittker’s conclusions. This is not to say that lay judges are bound by

an expert's opinion, but only that they cannot reject clear and credible evidence without a basis in the evidence to do so.

The state seeks to create an inconsistency in Dr. Bittker's opinions by arguing that he found Mr. Dennis competent under the standard of Dusky v. United States, 362 U.S. 402 (1960). Res. Ans. Br. at 28-30. Dr. Bittker's report and testimony makes the distinction he drew quite clear: Mr. Dennis is capable of intellectually understanding his situation, but he cannot rationally choose among his options because of the effect of his mental illness; and this distinction fits exactly into the analysis prescribed by Rumbaugh, 753 F.2d at 398. A more flamboyant hypothetical may illustrate the distinction: if an individual were completely capable of understanding his situation and his litigation options, but were convinced that he had to follow a particular course of action because he had to follow the directions of men from Mars, we would all recognize that the individual is incompetent under either Rees or Dusky, assuming there is any distinction between them. Cf. Godincz v. Moran, 509 U.S. 389, 397-398 and n. 9 (1993). While the influence of his mental illness on Mr. Dennis' decision may be somewhat more subtle, it is equally clear from Dr. Bittker's testimony that it is the product of his disorder and not of his own volition.

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The semantic confusion arises from the dictum in Moran upon which the state relies.² That dictum suggests that the “rational choice” language of Rees may not mean anything different from the “rational understanding” language of Dusky, 509 U.S. at 398 n. 9. The dictum in Moran can be reconciled with the Rees and Rumbaugh standards if we agree that the “rational understanding” language in the Dusky standard subsumes the ability to decide rationally, and not merely the ability to understand a situation intellectually and abstractly. Thus, if the person’s decision-making ability is controlled by mental illness, that deficit could be characterized as a failure of “rational understanding” under Dusky as well as “rational choosing” under Rees. While legal professionals may be able to parse the language of the cases to preserve that distinction, mental health experts will not easily recognize that “rational understanding” must include an ability to make rational choices among available options that is not “substantially affected” by mental illness.

²It is clear that the language in Moran is dictum: there was apparently no argument in Moran that the Rees decision imposed a higher standard than Dusky and, in fact, the prevailing party did not seek to defend the lower court’s decision imposing a higher standard of competence to plead guilty. 509 U.S. at 397-398; id. at 408 (Kennedy, J., concurring). In addition, the evidence involved in Moran, unlike this case, did not include any testimony that the defendant had a mental disorder that “substantially affected” his ability to make rational choices, 509 at U.S. at 392-393, and it did not involve a decision to abandon proceedings and seek execution.

This case illustrates the problem: Dr. Bittker made a clear medical distinction between Mr. Dennis' intellectual understanding of his situation and his inability to choose execution volitionally, because that decision is dictated by his mental illness; but he couched the opinion in terms of an ability to choose rationally rather than an ability to understand rationally. X ER 1602, XI ER 1854, 1858. In cases such as this one, in which the individual maintains an apparently lucid demeanor despite his inability to make a choice to seek execution that is not "motivated" by his mental illness, XI ER 1857, maintaining this distinction is necessary to the proper enforcement of the Rees standard, and Moran does not require a different result.

In sum, however the standard is phrased, it cannot be clearer that Mr. Dennis' decision is the product of his mental illness. The state points to no evidence that contradicts this expert conclusion; and under the standard of Rees v. Peyton, Mr. Dennis cannot rationally be found competent to seek his own execution.

III. THE STATE COURT FINDING OF COMPETENCE IS NOT ENTITLED TO A PRESUMPTION OF CORRECTNESS BECAUSE THE STATE COURT PROCEEDINGS WERE DEFECTIVE AND UNRELIABLE.

In the opening brief, appellant argued that the presumption of correctness, 28 U.S.C. § 2254 (e)(1), does not apply because the state court hearing on Mr.

Dennis' competence was "defective" within the meaning of Taylor v. Maddox, 366 F.3d 992, 1021 (9th Cir. 2004). Opening Br. at 22-24. The state's brief recites the general case law on the presumption of correctness, but it does not discuss the non-adversary and unreliable nature of the state hearing, beyond stating that appellant has not presented authority on that point. Resp. Ans. Br. at 25.³ The state's brief does not even mention, much less analyze, the Taylor decision, which is authority supporting appellant's argument, and the state cites no contrary authority. The state does not dispute that the record shows that appointed counsel for Mr. Dennis took the position that he would not litigate against his client's desire to seek execution, X ER 1621, 1645; see also II Resp. ER 355 (appointed counsel's argument to "do what he [Mr. Dennis] requires"), rendering the proceeding non-adversarial. The state also does not dispute that, as a result of that lack of adversity, Dr. Bittker's testimony was not presented to the state court,

³Although the state invokes the standards of deference prescribed in 28 U.S.C. § 2254(d), Resp. Ans. Br. at 2-6, they are not directly relevant to the issue before this court. The deference standards of § 2254(d) apply to the resolution of the substantive constitutional claims on which habeas relief can be granted, and the state cites no authority suggesting that those standards apply to the resolution of the jurisdictional question of next friend standing. By contrast, appellant has referred to the analysis of the § 2254(d) standards only in the way they were considered in Taylor v. Maddox, 366 F.3d at 999-1008, as shedding light on the presumption of correctness analysis under 28 U.S.C. § 2254 (e)(1). See App. Opening Br. at 23-24.

which would have made it clear that Dr. Bittker’s unequivocal medical opinion was that Mr. Dennis is not competent – because his decision to seek execution is a product of his mental disorder and not of his volition – and further that Mr. Dennis’ demeanor would not display obvious signs of incompetence and that the very rigidity of Mr. Dennis’ desire to die was an indication of the effect of his disorder. XI ER 1858. In the absence of that information, the state courts could not make a reliable determination of competence, and therefore the presumption of correctness cannot be applied.⁴

The failure of the state to address these points should be viewed as a concession of the issue. In any event, since the state’s brief does not present any relevant argument in response to appellant’s specific argument there is essentially nothing to which appellant can reply. Accordingly, appellant relies on the arguments presented in the opening brief.

⁴Even without considering Dr. Bittker’s testimony in the federal proceedings, the state court’s decisions are not entitled to the presumption of correctness because they “ignore[d] evidence that supports petitioner’s claim.” Taylor v. Maddox, 366 F.3d at 1008. Neither the state district court nor the Nevada Supreme Court devoted any analysis to the conclusion in Dr. Bittker’s report that Mr. Dennis’ decision to seek execution was “directly a consequence” of his mental illness. XI ER 1603. The failure of the state courts to consider that evidence, which squarely fits within the standard of Rees v. Peyton, left the state court findings unsupported by the record and thus not entitled to the presumption of correctness. See Taylor v. Maddox, 366 F.3d at 1001, 1008.

IV. MR. DENNIS' FORMER LAWYER, WHO PREVIOUSLY REPRESENTED HIM, IS AN APPROPRIATE NEXT FRIEND.

The state argues that, even if Mr. Dennis is incompetent, the next friend petition still cannot be entertained because Ms. Butko is not an appropriate next friend, going so far as to argue that Ms. Butko should not be granted next friend standing because she is not Mr. Dennis' "friend." Resp. Ans. Br. at 36.

The state does not distinguish the numerous cases holding that a former lawyer for the individual is an appropriate next friend. E.g., Ford v. Haley, 195 F.3d 603, 605 and n.1 (4th Cir. 1999); see App. Opening Br. at 16. As in those cases, Ms. Butko was counsel for Mr. Dennis and she had a several-year relationship with him. Thus, legally, there is no basis for the claim that a former attorney cannot properly serve as a next friend.

On the facts of this case, Ms. Butko is clearly an appropriate next friend. The petition alleges that she is litigating on Mr. Dennis' behalf because of "his inability to make a rational decision with respect to continuing or abandoning further litigation...." I ER 2; and she is the only person involved in the litigation for whom Mr. Dennis told Dr. Bittker, he has "some positive regard." X ER 1600. The district court allowed Mr. Dennis to say anything he wanted in the hearing below, and, other than objecting to the filing of the petition, XI ER 1816, he

expressed no hostility at all toward Ms. Butko. XI ER 1801-1824, 1872. The state did not seek to examine Ms. Butko or Mr. Dennis below on the subject of their relationship, and the district court made no factual finding that Ms. Butko was not devoted to Mr. Dennis' interests. XI ER 1889-1903.

The state's basic point is that Ms. Butko could not be devoted to Mr. Dennis' interests because she withdrew (after representing him for three years) because his suicidal plan to seek execution was repugnant to her. Resp. Ans. Br. at 36. Neither the state courts, nor the district court below, suggested that there was anything improper about an attorney withdrawing from representation because she could not in good conscience facilitate a client's suicidal desires. See Nev. Sup. Ct. Rule 166 (2)(c); see McKay v. Bergstedt, 106 Nev. 808, 819, 801 P.2d 617, 625 (1990) (no liberty interest requiring assistance in terminating life on part of person in sound health but who considers "life unbearably miserable because of his mental state"). But Ms. Butko's motion to withdraw and her statements at the state court hearing established that she was not simply trying to vindicate constitutional claims in the abstract. Rather, her primary point was that Mr. Dennis is mentally ill and suicidal, and could not properly be allowed to seek execution without those issues being addressed. II Resp. ER 350, 352. Her appearance as a next friend to litigate on behalf of Mr. Dennis' legitimate interests

– rather than on behalf of his interest in using the state as a “vehicle for suicide,” XI ER 1857 – arose only after the state courts ignored the evidence of his incompetence, and thus protecting his legitimate interests required litigation in federal court.

Nothing in the record before this Court supports the state’s argument on this point; and there is not basis for holding (as a matter of law, since the district court made no factual finding for this Court to review) that Ms. Butko is not an appropriate next friend.

V. CONCLUSION.

For the reasons stated above and in the opening brief, the district court could not find that Mr. Dennis is competent to seek his own execution, in light of the uncontradicted evidence that his decision is “motivated” by his mental illness. Accordingly, the judgment denying standing to the next friend must be reversed.

Respectfully submitted this 16th day of July, 2004.

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CERTIFICATE OF COMPLIANCE

_____I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C) and 9th Cir. R. 32-1, the attached reply brief is proportionately spaced, has a typeface of 14 points or more and contains 3618 words.

Respectfully submitted this 16th day of July, 2004.

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CERTIFICATE OF SERVICE

In accordance with Rule 5(b) of the Federal Rules of Civil Procedure, the undersigned hereby certifies that I am an employee of the Office of the Federal Public Defender and on this 16th day of July, 2004, I served a copy of the foregoing APPELLANT'S REPLY BRIEF by (1) e-mail, (2) fax, and (3) mailing a copy via Federal Express thereof to:

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