No. SC97469

IN THE

Supreme Court of Missouri

ANTHONY CARUTHERS,

Relator,

v.

THE HONORABLE WENDY WEXLER-HORN, JUDGE OF THE CIRCUIT COURT OF THE COUNTY OF ST. FRANCOIS, 24TH JUDICIAL CIRCUIT,

Respondent.

On Petition for a Writ of Prohibition

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

The State charged Mr. Caruthers (Relator) with murder in the first degree, armed criminal action, burglary in the second degree, tampering in the first degree, tampering with physical evidence, resisting arrest, and escape from custody (Appx. 1-3). After the filing of the information on March 8, 2017, the case proceeded through discovery and other pre-trial matters.

On March 11, 2018, Relator filed a discovery response that indicated that he did not have "any reports or statements of experts made in connection with the above cause, including results of . . . mental examinations . . . which the defense intends to introduce into evidence."[1] The response further stated, "At this time, the defendant does not intend to rely on the defense of mental disease or defect excluding responsibility."

On April 12, 2018, in a supplemental discovery response, Relator disclosed that he anticipated disclosing a report from Dr. Stacie Bunning, PsyD., which was not yet complete (Appx. 4). Thereafter, on April 20, 2018, Relator disclosed two reports authored by Dr. Bunning (Appx. 6). As alleged by Relator in his petition, Dr. Bunning opined that "Relator was not capable of deliberation at the time of the alleged murder offense" (Pet. 1).

[1] This response was included in the case file that was transferred by the Court of Appeals.

On April 23, 2018, the State filed a motion requesting that the court order a mental examination of Relator pursuant to section 552.020 (*see* Appx. 8). The State filed a second motion on May 2, 2018, pursuant to sections 552.015 and 552.020 (Appx. 9). The State requested that Respondent "direct that a written report of such examination be filed with [the trial court] and further order the report to include: (1) Detailed findings; (2) An opinion as to whether the defendant has a mental disease or defect; and (3) An opinion based upon a reasonable degree of medical or psychological certainty as to whether the accused, as a result of a mental disease or defect, did not have a state of mind which is an element of the offense" (Appx. 9). Respondent granted the State's second motion (Appx. 10).

Relator filed a petition for a writ of prohibition in the Court of Appeals. Respondent filed an answer that admitted most of the factual allegations in the petition but denied other allegations. In particular, Respondent denied Relator's allegation that there was no statutory authority for her order, stating, "[Respondent] has the authority to order and [sic] examination to determine if Relator had a mental disease or defect which rendered him incapable of forming the requisite mental state to commit the charged offense" (Answer 2).

The Court of Appeals granted a preliminary order in prohibition and, after considering suggestions filed by the parties, the court made permanent

its preliminary order and directed Respondent "to vacate and set aside her order of May 2, 2018, ordering a mental examination of Relator" (slip op. 2).

The court first concluded that § 552.015 provided no authority for Respondent to order a mental examination (slip op. 3). The court then stated that § 552.020 permitted Respondent to order an examination in only two circumstances: first, if Respondent had "reasonable cause to believe" Relator was not competent to stand trial; and second, if Relator had "pleaded lack of responsibility due to mental disease or defect" (slip op. 3-4).

The court held that the first circumstance was inapplicable because Respondent's order was not directed at ascertaining Relator's competence to stand trial (slip op. 3). The court held that the second circumstance was inapplicable because Relator had not entered "a plea of not guilty by reason of mental disease or defect" (slip op. 4). The court rejected Respondent's assertion that there was "no functional difference" between Relator's notice of Dr. Bunning's intended testimony and a notice of intent to rely upon the defense of mental disease or defect excluding responsibility (slip op. 4; *see* Resp. Sugg. in Opp. 6-8).

Finally, although, the court observed that "the only issue currently before [it] [was] whether the trial court had authority to order a mental examination of Relator under Chapter 552," the court also discussed (and rejected) the propriety of a trial court's ordering a mental examination under

the facts of this case pursuant to Rule 25.06(B)(9) (slip op. 6-12). One judge concurred in the court's holding that "neither Section 552.015 nor Section 552.020" granted Respondent authority to order the examination; however, the concurring judge would have held that "the trial court does have the authority to order a mental examination for good cause shown under Rule 25.06(B) based on a defendant's anticipated use of the negative defense of diminished capacity" (conc. op. 1).

ARGUMENT

I.

Respondent had authority to order a mental examination of Relator because, by giving notice that his expert would testify that he was "not capable of deliberation," Relator gave notice that he intended to rely on a defense of a mental disease or defect "to avoid criminal responsibility altogether."

In *State ex rel. Proctor v. Bryson*, 100 S.W.3d 775 (Mo. 2003), the Court examined the two circumstances under section 552.020 that permit a trial court to order a mental examination of a defendant in a criminal case. The Court observed that "[t]he first circumstance when such an evaluation is proper occurs: 'When any judge has *reasonable cause* to believe that the accused lacks mental fitness to *proceed*, he shall, upon his own motion or upon motion filed by the state or by or on behalf of the accused, by order of record, appoint one or more private psychiatrists or psychologists, . . . or physicians . . . to examine the accused.' " *Id.* at 777 (citing § 552.020.2).

This part of section 552.020 "specifically addresses the occasion when a defendant lacks the capacity to understand the proceedings or lacks the ability to assist counsel in the defense." *Id.* "The statute requires a court-ordered psychiatric examination upon the showing of reasonable cause that the accused lacks the mental fitness to proceed." *Id.* "It does not allow the

court to order an examination as to the mental capacity of Relator at the time of the alleged criminal conduct." *Id*.

Accordingly, § 552.020.2 did not authorize the part of Respondent's order that directed that the report should include "[a]n opinion based upon a reasonable degree of medical or psychological certainty as to whether the accused, as a result of a mental disease or defect, did not have a state of mind which is an element of the offense" (Appx. 9-10). However, that is not the end of the analysis.

"The second circumstance in which a psychiatric evaluation is proper under section 552.020 arises in subsection 4." *See Proctor*, 100 S.W.3d at 777. That subsection provides:

> If the accused has pleaded lack of responsibility due to mental disease or defect or has given the written notice provided in subsection 2 of section 552.030, the court shall order the report of the examination conducted pursuant to this section to include . . . an opinion as to whether at the time of the alleged criminal conduct the accused, as a result of mental disease or defect, did not know or appreciate the nature, quality, or wrongfulness of his conduct or as a result of mental disease or defect was incapable of conforming his conduct to the requirements of law.

§ 552.020.4, RSMo 2016.

As the Court explained in *Proctor*, this subsection "controls the court's action when a *defendant asserts* that she was not guilty due to mental disease or defect." 100 S.W.3d at 778 (emphasis in original). In addition, section 552.030 likewise authorizes the court to order a mental examination and report of the same type "[w]henever the accused has pleaded mental disease or defect excluding responsibility or has given the written notice provided in subsection 2 of this section[.]" § 552.030.3, RSMo 2016.

Here, while Relator did not formally plead not guilty by reason of mental disease or defect, he nevertheless gave notice that he intended to present evidence showing that he was not guilty of murder in the first degree due to mental disease or defect. In his third supplemental discovery response—wherein Relator listed reports of experts the defense intended to introduce into evidence at trial—Relator disclosed two reports authored by Dr. Stacie Bunning (Appx. 6). In those reports, as alleged in Relator's petition, Dr. Bunning concluded that "Relator was not capable of deliberation at the time of the alleged murder offense" (Pet. 1).[2]

Relator asserts that he disclosed only that he intended to rely on the defense of diminished capacity. However, even if Relator intends to rely on that defense, by effectively giving notice that his expert would testify that he

[2] Respondent admitted this factual allegation in her answer.

was "not capable of deliberation," Relator gave notice that he intended to rely on evidence of a mental disease or defect "to avoid criminal responsibility altogether." *See State v. Walkup*, 220 S.W.3d 748, 754-56 (Mo. 2007).

In *Walkup*, the Court discussed the distinction between evidence showing that a defendant would have *difficulty* deliberating and evidence showing that a defendant was *incapable* of deliberating. The Court observed —based on its previous holding in *State v. Erwin*, 848 S.W.2d 476 (Mo. 1993)—that where a defendant seeks to present evidence that the defendant was "incapable of deliberating," it is "clear that the defense was attempting to exclude or avoid responsibility." *Walkup*, 220 S.W.3d at 755.

In short, when Relator disclosed his intent to rely on Dr. Bunning's testimony that he was "not capable of deliberation," it was reasonable for Respondent to accept Relator's disclosure as notice of his intent to assert that he was "not guilty due to mental disease or defect." Accordingly, it was not an abuse of discretion for Respondent to exercise her authority to order a mental examination that included an opinion as to whether at the time of the alleged criminal conduct Relator, as a result of mental disease or defect, did not know or appreciate the nature, quality, or wrongfulness of his conduct or was incapable of conforming his conduct to the requirements of law. *Cf. State ex rel. Thurman v. Pratte*, 324 S.W.3d 501, 504-05 (Mo.App. E.D. 2010) (holding that defendant's intent to present mitigation evidence showing that he was

intellectually disabled was not the equivalent of giving notice of intent to rely on a mental disease or defect excluding responsibility).

This Court has recognized that the notice provision of § 552.030 (which is cross-referenced in §552.020.4) "is to prevent surprise to the State." *State v. Isa*, 850 S.W.3d 876, 886 (Mo. 1993). Moreover, it has long been recognized that "the rules set forth under Rule 25 'promulgate a procedure, within constitutional definition, for mutual pre-trial disclosure between the parties in cases of felony. Their desideratum is a quest for truth which promotes informed pleas, expedited trials, a minimum of surprise and opportunity for effective cross-examination.' " *State ex rel. Westfall v. Crandall*, 610 S.W.2d 45, 46-47 (Mo.App. E.D. 1980).

"The fundamental purpose of a criminal trial is the fair ascertainment of the truth." *State v. Carter*, 641 S.W.2d 54, 58 (Mo. 1982). "Not only the defendant, but also the State of Missouri, has a direct interest in an accurate, just and informed verdict based upon all available relevant and material evidence bearing on the question." *Id.* "The trier of the fact must not be 'so effectively deprived of valuable witnesses as to undermine the public interest in the administration of justice.' " *Id.*

In light of these principles—as reflected in Chapter 552 and Rule 25—when a defendant discloses his intent under Rule 25.05(a)(1) to rely on expert testimony showing that he suffers from a mental disease or defect that

excludes responsibility, it is not an abuse of discretion for a trial court to order a mental examination to permit the State a fair opportunity to test the defendant's evidence and to present contrary evidence. As the Court observed in *Carter*, in such cases, "[t]he jury need[s] every bit of available evidence touching that issue in order to render an intelligent, fair and just verdict." *Id.*

In *Carter*, the Court confronted the question of whether a trial court could compel disclosure of a report generated by a defense expert who had performed a mental examination upon the defendant. There, the defendant had pleaded not guilty by reason of mental disease or defect, and, before trial, the defendant employed two experts. 641 S.W.2d at 56. One of the experts found that the defendant "suffered from a toxic psychosis excluding criminal responsibility," but the other expert found that the defendant "was not suffering from a mental disease or defect excluding criminal responsibility." *Id.* The defendant naturally decided to call the first expert but not the second expert. *Id.* The State sought an order to compel disclosure of the second expert's report, and the trial court ordered the disclosure. *Id.*

This Court upheld the trial court's order, and, after observing that the defendant had waived various privileges by pleading a mental disease or defect, the Court found that Rule 25 compelled disclosure of the report. *Id.* at 58-59. The Court observed that Rule 25.05(A)(1) required disclosure of "results of mental examinations which the defense intends to introduce at the

trial," and the Court further observed that, "[u]nder Rule 25.06(A), subject to constitutional limitations, a defendant may be required, by court order on motion, to disclose to the State material and information not covered by Rule 25.05, upon a finding by the court that the State's request is reasonable, and that the material and information sought is relevant and material to the State's case." *Id*. at 58. The Court concluded, "Unquestionably the material disclosed and information sought was relevant and material to the State's case." *Id*. The Court observed that the expert's "report and testimony bore directly upon the central issue in the case: whether defendant at the time of the homicide was mentally responsible for his acts." *Id*. Here, similarly, once Relator disclosed his intent to rely on a defense of mental disease or defect excluding responsibility, it was within Respondent's discretion to order a mental examination that encompassed that defense.

Permitting a mental examination upon the filing of Relator's notice in this case also preserved Relator's ability to present his intended evidence at trial. As the Court observed in *Erwin*, a defense based on the accused's being "incapable of forming the mental element necessary to commit a crime is necessarily based on evidence of a mental disease or defect as defined in

§ 552.010." 848 S.W.2d at 480.[3] However, absent notice, such evidence is not admissible at trial. *Id.* Accordingly, if Relator insists that he was not giving such notice, then his expert's intended testimony is not admissible.

As outlined above, this Court's rules and the notice requirement found in Chapter 552 are designed to avoid surprise, promote fairness, and provide the finder of fact with all relevant evidence. Thus, once a defendant states his intent to rely on evidence that he suffers from a mental disease or defect excluding responsibility, a trial court should be authorized to order a mental examination as permitted under Chapter 552.

A defendant should not be permitted to avoid the reciprocal discovery demands of the law by attempting to characterize his defense as "diminished capacity," when, in fact, the defendant intends to present evidence excluding responsibility. As the Court made plain in *Erwin* and *Walkup*, it is the substance of the defense that matters.

However, even in cases where a defendant intends only to assert a defense of "diminished capacity," this Court has recognized—and recently

[3] In *Erwin*, the defense was identified as "diminished capacity," but, as the Court later clarified in *Walkup*, the defense was actually an attempt to exclude responsibility; thus, "[t]he references to diminished capacity in *Erwin* are *dicta*." 220 S.W.3d at 755-56.

addressed—the need for a level playing field. At the time of Relator's disclosure in this case, Rule 25.05(A)(4) stated, "If the defendant intends to rely on the defense of mental disease or defect excluding responsibility, disclosure of such intent shall be in the form of a written statement by counsel for the defendant." Rule 25.05(A)(4) (2018) (effective until July 1, 2018). However, effective July 1, 2018, this Court promulgated a new version of Rule 25.05, with a new provision that requires a defendant to disclose in writing whether defendant "intends to rely on the defense of mental disease or defect excluding responsibility, *or to claim that defendant has a mental disease or defect negating a culpable mental state*[.]" Rule 25.05(a)(4) (2018) (emphasis added).[4]

By adopting this new disclosure requirement, the Court diminished the disadvantage that the State previously operated under when a defendant relied only on a defense of "diminished capacity" as opposed to a "defense of mental disease or defect excluding responsibility." *See generally Walkup*, 220 S.W.3d at 756 (observing that "[t]he history of section 552.030 supports the interpretation that notice is not required for diminished capacity evidence under section 552.015.2(8)."). This change reflects the Court's efforts to foster

[4] The disclosures in this case and Respondent's order all preceded the change to Rule 25.05.

fair and timely disclosure of material evidence. Thus, even in cases where a defendant intends to rely only on "diminished capacity," it stands to reason that the State could show good cause for obtaining an examination under Rule 25.06(b). *See State v. Boyd*, 143 S.W.3d 36, 44 (Mo.App. W.D. 2004); *Westfall*, 610 S.W.2d at 46-47.

In sum, in light of Relator's notice of intent to rely on a defense of mental disease or defect excluding responsibility, it was an appropriate exercise of Respondent's authority to order a mental examination of Relator. The petition for a writ of prohibition should be denied.

CONCLUSION

Any prior order or writ of prohibition should be quashed, and the Court should deny the petition for a writ of prohibition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with Rule 84.06(b) and contains 3,183 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word; and that pursuant to Rule 103.08, the brief was served upon all other parties through the electronic filing system.

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