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2026 VT 42

No. 25-AP-259

State of Vermont

Supreme Court

v.

On Appeal from
Superior Court, Franklin Unit,
Criminal Division

Jordan Lawyer

June Term, 2026

Alison S. Arms, J.

Charity R. Clark, Attorney General, and Arthur O. Brown and Zachary J. Chen, Assistant Attorneys General, Montpelier, and Bram W. Kranichfeld, Franklin County State's Attorney, St. Albans, for Plaintiff-Appellee.

Matthew Valerio, Defender General, and A. Alexander Donn, Appellate Defender, Montpelier, for Defendant-Appellant.

PRESENT: Reiber, C.J., Eaton, Waples, Nolan and Drescher, JJ.

¶ 1. **REIBER, C.J.** In this interlocutory appeal, defendant Jordan Lawyer argues that the trial court erred by excluding defense counsel from his upcoming competency examination. We hold that a competency examination is not a critical stage of proceedings where the Sixth Amendment right to presence of counsel attaches, and the trial court did not abuse its discretion to exclude counsel. We affirm.¹

¹ Under Vermont law, defendants are presumed competent unless they prove incompetency by a preponderance of the evidence. 13 V.S.A. § 4817(a). Competency relates exclusively to a defendant's present capacity to stand trial, which is separate from an insanity defense that requires analyzing a defendant's mental state at the time of the alleged offense. State

¶ 2. In October 2024, the State of Vermont charged defendant with second-degree murder, first-degree aggravated domestic assault, eluding law enforcement while operating a vehicle in a grossly negligent manner, and aggravated assault. The State alleges that defendant attacked his parents with a baseball bat, killing his father and wounding his mother, before fleeing in his mother’s car and ultimately colliding with a game warden’s truck.

¶ 3. Later that month, the trial court ordered a neutral psychiatric examiner, Dr. Keelin Garvey, to perform a competency examination. After interviewing defendant on three separate dates, Dr. Garvey reported she was unable to form an opinion as to his competency without administering “psychometric” testing. Dr. Garvey advised the court that defense counsel must be excluded from testing, stating that a third-party presence would violate the copyright and her professional ethics. She asserted that even disclosing the identity of the tests would impair the validity of the results. Dr. Garvey took the position that she would have to submit her final report without a competency finding if her concerns were not honored.

¶ 4. Defendant objected, insisting on his attorney’s presence and asserting he had the right to presence of counsel at the examination under the Sixth Amendment of the U.S. Constitution and Chapter 1, Article 10 of the Vermont Constitution. The State countered that the examination was not a critical stage of the prosecution and the right did not attach. The trial court denied defendant’s motion and barred defense counsel from the examination, concluding there was no constitutional right to counsel’s presence. Defendant moved under Vermont Rule of Appellate Procedure 5.1(a) for permission to take an interlocutory appeal of the trial court’s decision, which we accepted.

v. Gurung, 2025 VT 52, ¶ 11 n.2, ___ Vt. ___, 346 A.3d 459; see also P. Robinson, 2 Crim. L. Def. § 208(a) (2026) (“The insanity defense . . . differs in that it considers the defendant’s mental capacity at the time of the offense and serves to fully exculpate the defendant for his conduct, rather than simply to bar his trial.”).

¶ 5. We review questions of constitutional law de novo. State v. Green Mountain Future, 2013 VT 87, ¶ 15, 194 Vt. 625, 86 A.3d 981 (“We review the trial court’s conclusions of law, particularly its constitutional decisions, de novo.”). We will reverse a trial court’s exercise of discretion regarding procedural rulings if the defendant shows “the court’s discretion was either totally withheld or exercised on grounds clearly untenable or unreasonable.” State v. Merchant, 173 Vt. 249, 255, 790 A.2d 386, 392 (2001) (quotation omitted) (reviewing denial for competency evaluation for abuse of discretion).

¶ 6. The Sixth Amendment right to counsel, applicable to the states through the Fourteenth Amendment, is similar to the right conferred by the Vermont Constitution.² State v. Porter, 164 Vt. 515, 518, 671 A.2d 1280, 1282 (1996) (stating that we have “consistently held that the right to representation by counsel found in Chapter I, Article 10 of the Vermont Constitution confers a right similar to the federal Sixth Amendment right”). The right attaches at all “critical stages” of a criminal proceeding and “encompasses counsel’s assistance whenever necessary to assure a meaningful defen[s]e.” United States v. Wade, 388 U.S. 218, 224-25 (1967) (quotations omitted). We have further identified critical stages as “ ‘any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial.’ ” In re Carter, 2004 VT 21, ¶ 62, 176 Vt. 322, 848 A.2d 281 (quoting Wade, 388 U.S. at 226).

¶ 7. The right may attach at pretrial proceedings. Id. ¶ 66; Estelle v. Smith, 451 U.S. 454, 469 (1981) (observing longstanding recognition of “vital need for a lawyer’s advice and aid

² Defendant cites to Article 10 of the Vermont Constitution in support of his argument that he has the right to presence of counsel at the competency examination. But defendant does not argue that a different analysis applies under the Vermont Constitution. See A.B. v. S.U., 2023 VT 32, ¶ 10, 218 Vt. 123, 298 A.3d 573 (“The Vermont Constitution may provide greater protection than analogous provisions in the U.S. Constitution, but the proponent of such an argument bears the burden of explaining how or why the Vermont Constitution provides greater protection.” (quotation omitted)).

during the pretrial phase” (quotation omitted)). The Supreme Court of the United States has recognized that the opportunity to consult with counsel about a pretrial competency examination is a critical stage in the proceedings against a defendant distinct from presence of counsel at the exam itself. Estelle, 451 U.S. at 470-71. In a footnote, the Supreme Court acknowledged that:

[T]he issue before us is whether a defendant’s Sixth Amendment right to the assistance of counsel is abridged when the defendant is not given prior opportunity to consult with counsel about his participation in the psychiatric examination. . . . Respondent does not assert, and the Court of Appeals did not find, any constitutional right to have counsel actually present during the examination. In fact, the Court of Appeals recognized that an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination.

Id. at 470 n.14 (quotation and citation omitted).

¶ 8. Many jurisdictions, federal and state, have since relied on this footnote in concluding that defendants do not have the right to presence of counsel during pretrial competency examinations. See State v. Martin, 950 S.W.2d 20, 26 (Tenn. 1997) (recognizing “a substantial majority of state and federal jurisdictions” hold defendants do not have right to counsel during competency examinations); accord T. Travers, Right of Accused in Criminal Prosecution to Presence of Counsel at Court-Appointed or Approved Psychiatric Examination, 3 A.L.R.4th 910 (1981) (listing jurisdictions that hold defendants are “not constitutionally entitled to the presence of counsel at a court-ordered or -approved psychiatric examination”).³ Under this view, the defendant’s Sixth Amendment right to counsel and due process rights are not violated by court-ordered competency examinations. See Seng v. Commonwealth, 839 N.E.2d 283, 293 (Mass. 2005) (recognizing defendant is “adequately protected” during competency examinations because if found incompetent they will not stand trial; if found competent their statements made during

³ While some jurisdictions use the term “psychiatric examination” to encompass both competency examinations and insanity-defense examinations, our use of the term here is limited to the competency context. Whether the right to presence of counsel attaches at an insanity-defense examination is not before us on appeal.

examination are inadmissible at trial (quotation omitted)); State v. Hardy, 325 S.E.2d 320, 322 (S.C. 1985) (holding court-ordered competency examination is not critical stage “because procedural steps are not taken and no events take place that are likely to prejudice the defense”). Now, we join them.

¶ 9. We recognize that the Sixth Amendment right to counsel “depends primarily on the possibility of prejudice and unfairness in the proceedings and the ability of the presence of counsel to protect against such prejudice and unfairness.” Carter, 2004 VT 21, ¶ 62 (citing favorably Supreme Court cases stating same). But there is no risk of prejudice at the competency examination. These examinations are nonadversarial and not designed to determine the ultimate question of a defendant’s guilt; they have a “limited, neutral purpose.” Estelle, 451 U.S. at 465; see 8B C. Wright & A. Miller, Federal Practice and Procedure § 2236 (3d ed. 2026) (observing that psychiatric examinations are not “adversarial but scientific”). The trial court must conduct a competency hearing and order an exam “if there is ‘reason to believe that the defendant may be incompetent to stand trial’ ” to protect a defendant’s due process rights. State v. Beaudoin, 2008 VT 133, ¶ 15, 185 Vt. 164, 970 A.2d 39 (alteration omitted) (quoting 13 V.S.A. § 4817(b)); see id. ¶ 8 (citing Pate v. Robinson, 383 U.S. 375, 385 (1966)) (“Trying an incompetent defendant deprives [them] of [their] due process right to a fair trial.”); 13 V.S.A. § 4814 (permitting court to order examination).

¶ 10. Defendant’s rights are protected under Vermont law. After the exam, the examination statute provides counsel the opportunity to review the examination results, cross-examine psychiatric witnesses, and introduce defense witnesses. 13 V.S.A. § 4816(f) (stating admission of psychiatrist report ordered under § 4814 “shall not preclude either party . . . from calling the psychiatrist or psychologist who wrote the report as a witness or from calling witnesses or introducing other relevant evidence”); see also State v. Boyajian, 2022 VT 13, ¶ 35, 216 Vt. 288, 278 A.3d 994 (explaining that “a defendant whose competency has been called into question

has a constitutionally based right to hire, with state funding, a defense-retained mental health expert” to help their defense and avoid “erroneous determination of competency” (quotation omitted)); Hardy, 325 S.E.2d at 322 (rejecting defendant’s argument that he had right to presence of counsel at competency examination in part because “defense counsel had ample opportunity to cross examine the psychiatrist”). The exam is expressly noted in the case law as a “neutral evaluation” as distinguished from an expert examination retained by either party. Boyajian, 2022 VT 13, ¶ 36. Thus, there is no prejudice arising from the exclusion of counsel at the competency examination and the right to presence of counsel does not attach.⁴

¶ 11. Numerous courts have considered that a third party’s presence at a psychiatric examination “could contribute little and might seriously disrupt the examination.” Estelle, 451 U.S. at 470 n.14; accord United States v. Baird, 414 F.2d 700, 711 (2d Cir. 1969) (“In fact, the presence of a third party, such as counsel or a stenographer, at such examination tends to destroy the effectiveness of the interview.”); Wright & Miller, supra, ¶ 9 (observing attorney’s presence “might disrupt, or defeat the purpose of, the examination”—a concern that “may be heightened during a psychiatric examination”). The risk of disruption is significant; an ineffective examination may seriously impair the trial court’s ability to fulfill its statutory and constitutional obligation to determine a defendant’s competency, Boyajian, 2022 VT 13, ¶ 27, and cut against the State’s interest in an effective system of justice and the defendant’s right to be tried only while

⁴ We emphasize that while the competency examination itself is not a critical stage, the “significant decision of whether to submit to the examination” is. Estelle, 451 U.S. at 471. This distinction is aligned with those drawn by other jurisdictions that similarly conclude that the competency examination is not a stage at which the Sixth Amendment right to presence of counsel attaches. See, e.g., Commonwealth v. Baldwin, 686 N.E.2d 1001, 1005 (Mass. 1997) (“[W]e concluded that the decision to undergo psychiatric evaluation is a critical stage of the criminal process, entitling a defendant to assistance of counsel, but that the psychiatric interview itself is not a critical stage.”); State v. Whitaker, 2022-Ohio-2840, 207 N.E.3d 677, at ¶ 137 (citing United States v. Byers, 740 F.2d 1104, 1118-21 (D.C. Cir. 1984) (plurality opinion) for proposition that “although the decision to undergo a psychiatric evaluation is a critical stage, the interview itself is not”).

competent. We do not agree that defense counsel's participation even in a strict observational capacity mitigates such risk, because as then-Circuit Judge Scalia joined by then-Circuit Judge Ginsburg recognized:

[e]ven if counsel were uncharacteristically to sit silent and interpose no procedural objections or suggestions, one can scarcely imagine a successful psychiatric examination in which the subject's eyes move back and forth between the doctor and his attorney. Nor would it help if the attorney were listening from outside the room, for the subject's attention would wander where his eyes could not. And the attorney's presence in such a purely observational capacity, without ability to advise, suggest or object, would have no relationship to the Sixth Amendment's "Assistance of Counsel."

Byers, 740 F.2d at 1120. Of course, this is not to create a bright-line rule that counsel should always be excluded during competency examinations. As the trial court recognized, in certain cases there may be benefits to counsel's presence stemming from the rapport between counsel and a defendant, such as helpfully redirecting and facilitating examinations of a defendant who might otherwise not readily participate. Counsel's presence may smooth the process, but given our conclusion that the Sixth Amendment right to presence of counsel does not attach at competency examinations, the trial court has the discretion to permit or prohibit counsel at the examination.

¶ 12. Nonetheless, defendant argues our reasoning in Carter, that the right to counsel is not limited to proceedings with an "adversary character," necessarily compels us to recognize a right to presence of counsel at competency examinations. 2004 VT 21, ¶¶ 60-62 (quotation omitted). But Carter involved a presentence investigation (PSI) report. The PSI carried distinctly different possible consequences. PSI interviews can elicit information about past criminal conduct not otherwise protected by statute. By contrast, competency evaluations do not involve such information and are protected by statute. Id. ¶ 59; 13 V.S.A. § 4816(d). Given the limited type and scope of information addressed at competency examinations, and because Vermont's competency statutes establish a specific framework that goes beyond Daubert alone, we hold the trial court here did not err by concluding counsel's presence was not necessary either for effective

participation or to avoid prejudice. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589-92 (1993) (establishing test for expert testimony admissibility, which requires showing scientific evidence is relevant and reliable); 13 V.S.A. § 4814(a).

¶ 13. Next, defendant contends that without counsel's presence, any statements he makes may later be used to obtain admissible evidence against him, violating his right against self-incrimination and prejudicing his right to a fair trial. In support, defendant compares Federal Rule of Criminal Procedure 12.2(c)(4) and 13 V.S.A. § 4816(d). Federal Rule 12.2(c)(4) prohibits admitting a statement a defendant made during examination, expert testimony based on the statement, and "other fruits of the statement" to prove their guilt or to impeach them. Cf. 13 V.S.A. § 4816(d). Unlike Federal Rule 12.2(c)(4), however, § 4816(d) does not expressly prohibit a statement's fruits. Defendant contends that this difference would allow law enforcement to use statements made during examination to discover evidence later admissible at trial.

¶ 14. But the Fifth Amendment privilege against self-incrimination protects against defendant's concern. U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . ."). We have recognized that the privilege applies in court-ordered competency examinations. State v. Bushey, 147 Vt. 140, 144, 513 A.2d 1177, 1180 (1986) (citing Estelle, 451 U.S. at 467); see State v. Morale, 174 Vt. 213, 215, 811 A.2d 185, 187 (2002) ("The Fifth Amendment privilege against self-incrimination is violated when a defendant is compelled to produce testimony against himself."). While § 4816(d) does not expressly prohibit using a defendant's statements made during examination, that protection is secured by the Fifth Amendment, which requires neither an enabling statute nor grant of use immunity to be effective. See, e.g., Adams v. Maryland, 347 U.S. 179, 181 (1954) ("Indeed, a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his

objection. The Fifth Amendment takes care of that without a statute.”).⁵ Thus, a defendant’s statements made during a competency examination cannot be used against them unless the defendant was “apprised of [their] rights and had knowingly decided to waive them.” Estelle, 451 U.S. at 469. Given the limited scope of the issues raised in this interlocutory appeal, we do not reach defendant’s other arguments.⁶

¶ 15. Finally, after holding the trial court has discretion to exclude counsel from competency examinations, we review its decision to exclude defense counsel for an abuse of that discretion. Defendant argues that the trial court abused its discretion by failing to “appropriate[ly] balance” his due-process rights and Dr. Garvey’s disclosure concerns. But the court weighed “the nature and consequences of the offenses charged, defendant’s criminal history, the declared purpose for counsel’s presence, and Dr. Garvey’s concerns with counsel’s attendance.” It emphasized that its conclusion to exclude counsel would not prevent defendant from “call[ing] Dr. Garvey as a witness, cross-examin[ing] her, or depos[ing] her, based on her written report.” Furthermore, Dr. Garvey’s conclusions, like those of all psychiatric experts, are subject to scrutiny under Daubert. See Daubert, 509 U.S. at 580 (“Faced with a proffer of expert scientific testimony[,], the trial judge . . . must make a preliminary assessment of whether the testimony’s underlying reasoning or methodology is scientifically valid and properly can be applied to the facts

⁵ We have indicated that the Fifth Amendment prohibits admitting evidence obtained solely as a result of a defendant’s statements to a psychiatrist during a competency examination. See Bushey, 147 Vt. at 144, 513 A.2d at 1180 (citing Kastigar v. United States, 406 U.S. 441, 460 (1972)); Kastigar, 406 U.S. at 460 (barring use of compelled testimony as “investigatory lead” and use of “any evidence,” including derivative evidence, “obtained by focusing investigation on a witness as a result of his compelled disclosures”).

⁶ Defendant appears to argue that the amount of information Dr. Garvey conveyed about the testing was insufficient to allow defense counsel to advise defendant whether he should submit to the testing. The trial court’s order answered the issue before us, whether defendant has a right to presence of counsel at the competency examination, in the negative. Defendant’s request for permission to appeal raised the right to presence of counsel issue only, but not the notice issue. Therefore, we will not address the notice issue because it is not within the scope of our interlocutory review under Rule 5.1.

at issue.”); USGen New England, Inc. v. Town of Rockingham, 2004 VT 90, ¶¶ 18-19, 177 Vt. 193, 862 A.2d 269 (recognizing Vermont has adopted Daubert’s admissibility principles); V.R.E. 702 (codifying Daubert principles); State v. Sullivan, 2017 VT 24, ¶ 26, 204 Vt. 328, 167 A.3d 876 (“Vermont trial judges ‘must now act as gatekeepers who screen expert testimony ensuring that it is’ both reliable and relevant.” (quoting USGen New England, Inc., 2004 VT 90, ¶ 19)).

¶ 16. Ultimately, the trial court has a duty to ensure an incompetent defendant is not tried. Beaudoin, 2008 VT 133, ¶ 8. Because the competency examination is a “crucial diagnostic tool, the judicial aim must be to make it an effective instrument of justice.” State v. Whitlow, 210 A.2d 763, 772 (N.J. 1965), superseded by statute on other grounds by State v. Arrington, 359 A.3d 1166 (N.J. 2026). This aim requires the trial court to exercise its discretion in overseeing the process to carry out its duty. Defendant fails to show that the trial court’s discretion was “either totally withheld or exercised on grounds clearly untenable or unreasonable.” Merchant, 173 Vt. at 255, 790 A.2d at 392 (quotation omitted).

Affirmed.

FOR THE COURT:

Chief Justice