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SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellant,

v.

HOWARD A. HEMSING,
Defendant-Appellee.

Supreme Court Case No.: CRA12-015
Superior Court Case No.: CF0456-09

OPINION

Cite as: 2012 Guam 19

Appeal from the Superior Court of Guam
Argued and submitted on October 24, 2012
Dededo, Guam

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ORIGINAL

BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

MARAMAN, J.:

[1] Plaintiff-Appellant the People of Guam (“People”) appeal from a decision and order issued by the trial court dismissing with prejudice the case against Defendant-Appellee Howard Abel Hemsing. The People argue that, following conflicting reports by experts concerning Hemsing’s competency and capacity to stand trial, and prior to dismissal, the law mandates a hearing to resolve issues of competency in order to determine the disposition of the case, to provide the People with an opportunity to be heard and seek preservation of the right to reinstate the prosecution. Hemsing argues that dismissal with prejudice was the only appropriate remedy and that no such hearing is required, considering the People agreed with the trial court’s factual findings concerning Hemsing’s competency.

[2] We hold that the People must be provided with notice and an opportunity to be heard before dismissal with prejudice in this case, and we therefore reverse the decision and order issued below.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] Defendant-Appellee Howard A. Hemsing was charged via indictment with a single count of possession of marijuana with intent to manufacture and two counts of possession of marijuana with intent to distribute, all as first-degree felonies, for acts allegedly committed in 2008 and 2009 in violation of 9 GCA § 67.401.1(a)(1) and (b)(1). Thereafter, Hemsing entered a plea of not guilty by reason of mental illness, disease, or defect, pursuant to 9 GCA § 7.22. Consequently, the trial court ordered a formal psychological forensic evaluation to determine whether Hemsing had such an illness, disease, or defect, rendering him unable to assist or

cooperate with counsel, or to otherwise participate in his own defense. Dr. James J. Kiffer, Ph.D., a clinical psychologist, conducted the first evaluation of Hemsing and submitted his findings to the trial court. Dr. Kiffer ultimately concluded that Hemsing appeared competent. Record on Appeal (“RA”), Dec. & Order re: Mot. Recons. at 1(Mar. 30, 2012). Specifically, Dr. Kiffer opined that Hemsing was competent to be proceeded against and sentenced, that he was able to distinguish right from wrong, and that he did not appear to suffer from any delusional disorders. RA, Opp’n Def.’s Mot. Dismiss at 2 (Apr. 28, 2011).

[4] Thereafter, Hemsing filed a motion, pursuant to 9 GCA § 7.25(c), requesting appointment of an independent psychiatrist to assist in his defense and further aid counsel in deciding whether to continue placing his mental state at issue. The court granted the motion and Dr. Martin Blinder, M.D., conducted the second evaluation of Hemsing. In his evaluation submitted to the trial court, Dr. Blinder recorded his conclusions that Hemsing suffered from delusional disorder, grandiose, which “incapacitate[d] his ability to collaborate with counsel in the preparation of a rational defense,” and further, that Hemsing’s disorder “substantially impaired his ability to appreciate the wrongfulness of acts.” RA, Dec. & Order re: Mot. Dismiss at 1-2 (June 24, 2011). Additionally, Dr. Blinder concluded that, but for this delusional disorder, Hemsing would not have committed the alleged offenses.

[5] On the basis of this second evaluation conducted by Dr. Blinder, and resting on the purview of 9 GCA § 7.43(f), Hemsing filed a motion to dismiss the charges against him, which the People promptly opposed. The trial court denied the motion to dismiss, finding that while Hemsing was not presently competent to stand trial, there was “potential for Hemsing to achieve competence in the foreseeable future.” *Id.* at 3.

[6] Hemsing thereafter filed a request for a competency hearing and/or reconsideration. The People did not file an opposition to this motion. Subsequently, the trial court issued a decision and order on the motion for reconsideration, ruling that while Hemsing's delusional disorder may be considered manageable, the disorder, which is "fixed," prevents him from cooperating with his attorney or participating in his defense. As such, the trial court found there was no substantial likelihood Hemsing would regain his competency in the foreseeable future, and thus dismissed the case with prejudice. The People filed a timely notice of appeal.

II. JURISDICTION

[7] This court has jurisdiction over this appeal pursuant to 48 U.S.C.A. § 1424-1(a)(2) & 1424-3(d) (Westlaw through Pub. L. 112-195 (2012)); 7 GCA §§ 3107 & 3108(a) (2005); and 8 GCA § 130.20(a)(5) (2005). *See* 8 GCA § 130.20(a)(5) ("An appeal may be taken by the government from . . . an order or judgment dismissing or otherwise terminating the action . . .").

III. STANDARD OF REVIEW

[8] Where the only issues raised from a decision and order on appeal are issues of law, we review the trial court's decision and order *de novo*. *People v. Rios*, 2008 Guam 22 ¶ 8 (citing *People v. Farata*, 2007 Guam 8 ¶ 14).

IV. ANALYSIS

[9] The central issue on appeal is whether the trial court erred in dismissing with prejudice the case against Hemsing after finding that he was incompetent and unlikely to regain competency in the foreseeable future, without first giving the People reasonable notice and an opportunity to be heard. However, as a preliminary matter we must also decide whether a trial court judge must hold a competency hearing if at least one psychiatrist concludes that a defendant may be incompetent to be proceeded against.

A. Whether Competency Must Be Determined By Hearing.

[10] Under Guam law, when a defendant pleads not guilty by reason of mental illness, disease or defect, the court must appoint at least one qualified psychiatrist or a qualified equivalent to examine the defendant and report on the defendant's mental condition. 9 GCA § 7.25(a) (2005). This report must be filed with the clerk of court, and include, *inter alia*, an opinion about the defendant's competency to be proceeded against and reasons buttressing that opinion. 9 GCA § 7.25(g)(5). What happens next is governed by 9 GCA § 7.43, which provides in pertinent part:

§ 7.43. Same: Hearing Procedure for Commitment and Release.

(a) If at least one psychiatrist concludes in his report filed pursuant to § 7.25 that the defendant may be incompetent to be proceeded against or to be sentenced, the court *shall order the issue of his competency to be determined* within ten days after the filing of the reports pursuant to § 7.25, unless the court, for good cause, orders the issue tried at a later date.

(b) *Any hearing* under this Section shall be by the court without a jury.

9 GCA § 7.43(a) & (b) (2005) (emphases added).

[11] The People argue that a competency hearing must take place under 9 GCA § 7.43(a) when the triggering facts are met. Appellant's Br. at 13 n.5 (July 9, 2012). But the statutory language calls for a "determination" to be made by the court, and does not explicitly mandate an open court competency hearing, which the People acknowledge in their opening brief. *See id.* at 8 n.4. Moreover, the language in section 7.43(b) provides that "any hearing" referenced in the section shall be conducted without a jury, instead of requiring the same of "all hearings." 9 GCA § 7.43(b). In other words, this language can be interpreted as stating "any hearing, should there be a hearing." *Id.* A competency hearing is not mandatory under the provisions of 9 GCA § 7.43.

[12] Accordingly, because we find that a competency hearing is not required under 9 GCA § 7.43, a trial court can properly make a determination as to competency solely on the basis of reports filed with the court pursuant to section 7.25.

B. Whether Notice and Opportunity to Be Heard Must Be Given to the People Before Dismissal.

[13] The second issue on appeal is whether, based on statutory language, the trial court must give the People notice and an opportunity to be heard before dismissing a case in which the trial court already made a factual determination that the defendant is incompetent to be proceeded against and that there is no substantial likelihood the defendant will regain competency in the foreseeable future. This language stems from 9 GCA § 7.43(f), which states:

If at any time the court determines that the defendant is incompetent and that there is no substantial likelihood that he will regain his competency in the foreseeable future, the court, upon its own motion, or upon motion of either party, *and after reasonable notice to the other party and an opportunity to be heard*, shall dismiss the pending indictment, information, or other criminal charges and order the defendant to be released or order the commencement of any available civil commitment proceedings.

9 GCA § 7.43(f) (emphasis added). By contrast, when the trial court finds there is a substantial likelihood that an incompetent defendant will regain competency in the foreseeable future, no hearing is required and no discretion is involved; instead, the trial court is simply required to commit the defendant to the Administrator of the Guam Memorial Hospital¹ for custody, care, and treatment. *Id.* § 7.43(d).

[14] The laws governing civil commitment for individuals found not guilty by reason of insanity are prescribed in Titles 8 and 9 of the GCA. *See* 10 GCA § 82204 (2005). The above-referenced statutes, which were derived from similar laws in California and New Jersey, require

¹ Commitments, when ordered, are referred to the director of the Department of Mental Health and Substance Abuse. *See* 10 GCA § 86104(a) (2005).

interpretation in order to establish the guidelines that are to be applied when building a bridge between criminal and civil proceedings that are currently separated by a gap in cases like these. We now turn to persuasive authority to bridge that gap.

[15] In California, when a psychiatric report indicates there is no substantial likelihood an incompetent defendant will regain competence in the foreseeable future, the law requires the defendant to return to court and face conservatorship proceedings. Cal. Penal Code § 1370(c)(2) (West 2012). But California jurisprudence has evolved to recognize that the court should simply release some defendants who are not restored to competency within the allowable time frame, rather than automatically sending them to face conservatorship proceedings. *See People v. Karriker*, 57 Cal. Rptr. 3d 412, 429 (Ct. App. 2007) (holding process leading to conservatorship not intended as “catch-all” for all incompetent defendants).

[16] The procedure set forth in New Jersey’s statutes is most illuminating.²

[17] When a defendant is deemed incompetent in New Jersey, the proceeding must be suspended. N.J. Stat. Ann. § 2C:4-6(b) (West 2012). New Jersey’s law provides the judge with discretion whether to institutionalize the defendant, and explicitly bars commitment for a period of time exceeding an ascertainable period during which it is substantially probable the defendant

² See N.J. Stat. Ann. § 2C:4-6(b) & (c) (emphasis added), which provides in part:

b. If the court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in subsection c. of this section. At this time, the court may commit him to the custody of the Commissioner of Human Services to be placed in an appropriate institution if it is found that the defendant is so dangerous to himself or others as to require institutionalization, or it shall proceed to determine whether placement in an outpatient setting or release is appropriate; provided, however, that no commitment to any institution shall be in excess of such period of time during which it can be determined whether it is substantially probable that the defendant could regain his competence within the foreseeable future.

....

c. If the defendant has not regained his fitness to proceed within three months, the court shall hold a hearing on the issue of whether the charges against him shall be dismissed with prejudice or held in abeyance. *The hearing shall be held only upon notice to the prosecutor and with an opportunity for the prosecutor to be heard.* When the charges are not dismissed, each defendant’s case shall be specifically reviewed by the court at six-month intervals until an order is made by the court that the defendant stand trial or that the charges be dismissed.

could regain competence in the foreseeable future. *Id.* After an incompetent defendant is civilly committed for three months, the progress of the defendant is reviewed, and this review is conducted by a New Jersey court via hearing. *Id.* § 2C:4-6(c). Specifically, the court must hold a hearing to decide whether the charges against the defendant should be dismissed with prejudice or held in abeyance. *Id.*

[18] Notably, the hearing to determine whether dismissal with prejudice or abeyance is proper can only be held “upon notice to the prosecutor and with an opportunity for the prosecutor to be heard.” *Id.* This language resembles the familiar language contained in 9 GCA § 7.43(f) that is at issue in this appeal. If at the hearing charges are not dismissed against the defendant, the court will continue to check on the defendant in six-month intervals to determine whether the defendant can stand trial, and will do so until the defendant does stand trial or charges are dismissed. *Id.*

[19] From the language of New Jersey’s statute, it is unclear if these subsequent determinations require open court hearings or if they merely require unilateral action by the judge. But a New Jersey Supreme Court report from October 1995, entitled “Report of the Committee to Review the Conrad Jeffrey Matter,” explains that subsequent determinations must be held by hearing at six-month intervals where the disposition of the case is at issue, and notice must be provided to the prosecutor.³ This report also highlights the troubling possibility that

³ The Assembly Judiciary Committee Statement, following section 2C:4-6 of New Jersey Statutes Annotated, states in part:

ASSEMBLY JUDICIARY COMMITTEE STATEMENT
Assembly, Nos. 450 and 686--L.1996, c. 133

The Assembly Judiciary Committee reports favorably Assembly Committee Substitute for Assembly Bill Nos. 450 and 686.

This substitute clarifies the procedures used in cases where a criminal defendant is found mentally incompetent to stand trial. Under the law, a person who lacks the fitness to proceed may be committed to a psychiatric institution for a period of time while the court waits to determine

defendants held in abeyance in psychiatric institutions can be released from confinement “without input from the criminal justice system” and without the prosecutors or victims ever getting wind of it. N.J. Stat. Ann. § 2C:4-6, Assembly Judiciary Committee Statement, Assembly, Nos. 450 and 686 -- L. 1996, c. 133.

[20] Shedding light on the case at bar, the trial court made a determination that Hemsing was incompetent to stand trial and that there was no substantial likelihood he would regain competency in the foreseeable future. RA, Dec. & Order re: Mot. Recons. at 3. As a result, 9 GCA § 7.43(f) is triggered, and under that provision, the People argue for their right to notice and an opportunity to be heard, after the determination of incompetency, to advocate for the commencement of civil proceedings where appropriate. Appellant’s Br. at 18. In fact, the People concede that while civil commitment proceedings may not be appropriate in Hemsing’s

whether he will recover sufficiently in order to stand trial on the charges. If the defendant does not become competent within an amount of time determined by the court, the court then decides whether to dismiss the charges, to release the defendant to the community, or to continue the defendant’s civil commitment to a psychiatric institution.

However, the statutes do not provide clear guidelines to the courts to assist in the determination as to whether the charges pending against a particular defendant should be dismissed or held in abeyance under these circumstances.

A recent New Jersey Supreme Court report (the “Report of the Committee to Review the Conrad Jeffrey Matter,” dated October, 1995) recommended imposing severe limitations on the circumstances under which the charges would be dismissed. If the charges are held in abeyance and not dismissed, the State would still be able to prosecute the matter at a later date when a once-incompetent defendant regains competence.

...

The Jeffrey report also noted that defendants who are committed to psychiatric institutions on grounds of incompetence to stand trial have a somewhat unclear status. According to the report, mental health professionals working in the institutions are not always aware of the criminal charges against these persons and prosecutors are not always aware of the procedures used in the institutions. Consequently, these defendants may end up administratively discharged from confinement in the psychiatric institutions without input from the criminal justice system.

This substitute would clarify the roles of prosecutors and mental health professionals with regard to these defendants. The substitute requires that prosecutors and victims be notified prior to the proposed release of these persons from confinement in the institutions and establishes standards and procedures to be followed to insure adequate communication between criminal justice and mental health professionals.

case, the decision as it stands sets a dangerous precedent, because without allowing the People to weigh in on the issue, the trial court could potentially release dangerous individuals unconditionally and against the interests of justice. *Id.*⁴

[21] We find the statutory guidelines in New Jersey persuasive. In Guam, the statutory language is clear that, upon its motion or the motion of either party, the trial court is required to supply notice and opportunity to be heard before dismissing the case and ordering the defendant to be released or ordering the commencement of civil proceedings. Accordingly, after making a determination as to Hemsing's competency—that Hemsing was incompetent to stand trial and that there was no substantial likelihood he would regain competency in the foreseeable future—the trial court should have held a hearing regarding dismissal of the case and whether the court should unconditionally release Hemsing or subject him to civil commitment proceedings. Hemsing so conceded at oral argument. *See* Digital Recording (“DR”) at 10:19 – 10:22 (Oral Argument, Oct. 24, 2012). Otherwise, the criminal court may lose jurisdiction if the case is dismissed before the disposition of the defendant is finally determined, which can lead to precarious results.⁵

[22] In light of these considerations, we hold that the trial court erred by failing to give the People notice and an opportunity to be heard under 9 GCA § 7.43(f) before dismissing Hemsing's case with prejudice and determining that Hemsing should be unconditionally

⁴ The People further assert that

Such a hearing...is necessary to flesh out the issue of how the case is to be disposed of going forward. The lower court's ruling is a dangerous precedent, in that similar rulings would potentially allow an individual who is a potential danger to the community to be released without giving the People an opportunity to argue that the correct disposition of the case would be the commencement of civil proceedings . . .

Appellant's Br. at 9(July 9, 2012).

⁵ In the event dismissal of the case is required, the court may still choose to defer dismissal until civil commitment proceedings are commenced and the disposition of the defendant is addressed.

released. To provide this opportunity, the court must hold a hearing to decide whether dismissal should be with or without prejudice and whether Hemsing should face civil commitment proceedings or be unconditionally released, thereby creating a factual record that speaks to whether Hemsing can be safely released. *See State v. Moya*, 748 A.2d 604, 607-08 (N.J. Super. Ct. App. Div. 2000) (decision to release incompetent defendants should be based on determination of likelihood defendants are dangerous to themselves or society and should be informed by comprehensive factual record).

[23] Additionally, the New Jersey statute contains a list of useful factors that the trial court should weigh at the hearing when deciding whether to dismiss the case against Hemsing and release him back into the community instead of forcing him to face civil commitment proceedings. These factors are: (1) the defendant's likelihood of regaining competency; (2) the duration of incompetency; (3) the nature and extent of the defendant's institutionalization; (4) the nature and gravity of the crimes charged; (5) the effects of delay on the prosecution; (6) the effects of delay on the defendant, including prejudice at trial; and (7) the public interest in prosecuting these charges. *See* N.J. Stat. Ann. § 2C:4-6(c).

C. Whether Opportunity to be Heard Includes Right to Challenge Factual Findings as to Competency.

[24] The third and final issue underlying this appeal is whether the parties, when indulging in the opportunity to be heard pursuant to 9 GCA § 7.43, can either support or challenge the factual determinations made by the trial court concerning the competency of the defendant. As discussed, this hearing is only conducted once the court has already determined that the defendant is incompetent to stand trial and that there is no substantial likelihood the defendant will regain competency in the foreseeable future.

[25] The People argue for the possibility of raising issues concerning a defendant's competency at this subsequent hearing. *See* Appellant's Reply Br. at 4 (Aug. 15, 2012) ("Finally, a new hearing would correct what the People now assert was a poor decision by the People and defense counsel at trial to submit the issue of competency in this case to the court *without* the benefit of a full competency hearing. This is the resolution the People recommend.") (emphasis in original) (internal citation omitted). By contrast, Hemsing argues that the People already had a chance to raise issues concerning his competency and forewent that opportunity. *See* Appellee's Br. at 12 (Aug. 10, 2012) ("Not only is the hearing in Section 7.43 the wrong time to argue future competence, but a dismissal with prejudice was appropriate given that the People do not dispute the lower Court's findings that the Defendant is not likely to regain competency in the foreseeable future.").

[26] New Jersey courts give the trial court, and not the experts, the responsibility of making the ultimate decision concerning competency and the likelihood defendants are dangerous to themselves or society. *See, e.g., Moya*, 748 A.2d at 607-08. Similarly, the parties here must give great deference to the trial court's factual finding concerning Hemsing's incompetency and the likelihood of recovery, and cannot subsequently challenge those settled findings in a hearing mandated by 9 GCA § 7.43(f), which should focus on the disposition of the case going forward and not on the status of Hemsing's competency to stand trial. In fact, the People submitted they may have waived their right to be heard on that issue anyway. *See* RA, Peoples' Opp'n to Def.'s Mot. Dismiss at 3 (Apr. 28, 2011) ("The People do not challenge the expertise of either expert here and therefore agreed to submit this issue on the two reports without an actual competency hearing.").

[27] There is no suggestion being made that the trial court was not fully cognizant of the consequences of dismissal with prejudice, and that a dismissal with prejudice would result in Hemsing's immediate release back into the community. Nevertheless, the language of the statute provides a right to notice and an opportunity to be heard on the dismissal of the case and whether the defendant is released or civil commitment proceedings are commenced, and not on the issue of the defendant's competency.

[28] Accordingly, we hold that the parties cannot support or challenge the factual determination made by the trial court concerning Hemsing's competency at the subsequent hearing mandated by 9 GCA § 7.43(f), where the determination to be made concerns only whether the trial court should dismiss with or without prejudice, and whether the trial court should unconditionally release the defendant or commence civil commitment proceedings.

V. CONCLUSION

[29] We hold that under 9 GCA § 7.43(a), the court was not required to determine Hemsing's competency to stand trial at a formal hearing. Instead, this determination was properly made solely on the basis of psychiatric reports filed with the court.

[30] We further hold that, once the trial court determined that Hemsing was not going to regain competency in the foreseeable future, it was required to provide the People with notice and an opportunity to be heard on dismissal of the case and whether Hemsing should be released or have civil commitment proceedings commenced against him.

[31] Finally, we hold that the trial court's determination of Hemsing's incompetency under the provisions of 9 GCA § 7.43(a) is not subject to review at the subsequent hearing held under the provisions of 9 GCA § 7.43(f), as deference is given to the trial court's resolution of the competency issue. Instead, the section 7.43(f) hearing is limited to the issue of whether to

dismiss the case with or without prejudice and release the defendant unconditionally or require the defendant to face civil commitment proceedings.

[32] For the foregoing reasons, we **REVERSE** and **REMAND** this matter to the trial court for further proceedings consistent with this opinion.

Original Signed - **Robert J. Torres**
By

ROBERT J. TORRES
Associate Justice

Original Signed - **Katherine A. Maraman**
By

KATHERINE A. MARAMAN
Associate Justice

Original Signed - **F. Philip Carbullido**
By

F. PHILIP CARBULLIDO
Chief Justice