MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. Ken-23-198

State of Maine
Appellee

v.

Dylan Ketcham
Defendant/Appellant

On appeal from guilty verdicts and sentences in the Kennebec Superior Court

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REPLY BRIEF FOR APPELLANT

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July 30, 2024

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ISSUE FOR REVIEW

I. Whether Dylan's Constitutional right to testify on his own behalf is not limited by the potential success or harm to his case and his incompetence should have been evaluated to protect his right to knowingly and voluntarily waive that right?

ARGUMENT

I. DYLAN'S CONSTITUTIONAL RIGHT TO TESTIFY ON HIS OWN BEHALF IS NOT LIMITED BY THE POTENTIAL SUCCESS OR HARM TO HIS CASE AND HIS INCOMPETENCE SHOULD HAVE BEEN EVALUATED TO PROTECT HIS RIGHT TO KNOWINGLY AND VOLUNTARILY WAIVE THAT RIGHT.

Whether Dylan's flat affect and failure to react to evidence [Jan. 25, 2023, at 36] was a result of his overmedication or some other reason, as the State suggests [State's Br. 21], it was incumbent upon the trial judge to investigate and have Dylan's competency evaluated. While Dylan did have a competency hearing prior to trial, any number of reasons could have caused a change in his competency status, and his own lawyers noted that on the day he allegedly waived his right to testify on his own behalf, that his condition had worsened.

The State's suggestion that trial counsel, rather than a licensed mental health evaluator, was in the best position to evaluate Mr. Ketcham's competency runs contrary to the statute, which provides that: "Upon motion by the defendant or by

the State, or upon its own motion, a court having jurisdiction in any criminal case may for cause shown order that the defendant be examined by the State Forensic Service for evaluation of the defendant's competency to proceed." 15 M.R.S. § 101-D. Nowhere does the statute provide that a defendant should be evaluated by his trial counsel in lieu of a State Forensic Examiner, certainly because there are no lawyers who are so qualified. Although Dylan's trial counsel could certainly weigh in as to his observations of Dylan's participation during the trial, whether Dylan was incompetent and therefore could not waive his Constitutional right to testify is a question only a qualified mental health evaluator could answer and should have been ordered to answer.

Here, the "cause shown" necessary to trigger a statutory forensic evaluation of Dylan for competency was the trial judge's observation during trial that Dylan's affect was flat, and more important, that he did not seem to be reacting to evidence. The trial judge's observations were affirmed by his trial lawyer's heightened concern for Dylan on the third day of trial. With these observations in mind, the trial judge should have ordered a competency evaluation, or at the least investigated further to determine the root of the noted observations. The failure to do so impacted Dylan's right to testify on his own behalf and his right to a fair trial.

In addition, the State's assertion that Dylan's claimed loss of his Constitutional right to testify was not a significant impact on his case because some of the evidence against him was allegedly detrimental, misses the point – Dylan's right to competently assess his right to testify is a Constitutional right – one that may result in admission of helpful or harmful evidence if he chose to testify. Nevertheless, the Constitutional right was still his to competently waive or invoke. The State's offer of evidence that might have been viewed by the jury as evidence of Dylan's guilt [State's Br. at 23] could just as easily have been viewed as statements by a young man asserting that he acted in self-defense, especially since he repeatedly asserted that he "did nothing wrong," and in fact was requesting that the police obtain recordings of the cell phone calls between him and Jordan because they would prove his innocence. [State's Br. at 23]. The State's reliance in its brief on evidence that was excluded by the trial judge on the grounds that it was highly prejudicial [State's Br. at 24-25; R. at 24], as an alleged "motive" for his attack on Caleb not only runs contrary to the motive the State placed before the jury – that Dylan attempted to kill Caleb because he was the only remaining witness [Tr. Jan 25, 2023, at 77-78, 109] – but also attempts to place evidence before this Court that the jury was not going to hear regardless of whether Dylan testified or not, because the trial judge determined that it was highly prejudicial.

In short, Dylan was denied the opportunity to competently evaluate whether he should testify on his own behalf after the State had rested and he was privy to the evidence against him. At that point in the trial, given the observations by the trial judge and Dylan's counsel, a competency evaluation should have been ordered to preserve Dylan's Constitutional right to competently waive or invoke his right to testify. Because one was not ordered Dylan was denied a fair trial. *State v. Ericson*, 2011 ME 28, ¶15, 13 A.3d 777, 782 (a criminal defendant has a Constitutional right to testify in his own defense and meaningfully participate in the presentation of his case); *State v. Tuplin*, 2006 ME 83, ¶ 14, 901 A.2d 792, 796 (a defendant may waive the right to testify, but only if such waiver is voluntary and knowing).

CONCLUSION

For the reasons set forth herein, this Court should reverse Dylan's conviction.

Date: July 30, 2024

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CERTIFICATE OF SERVICE

I, Michelle R. King, attorney for Dylan Ketcham, hereby certify that on this date I made service of two copies of the foregoing Reply Brief, by email and First-class mail, to the following counsel:

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