

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 2391

STATE OF LOUISIANA

VERSUS

JONATHAN FOY

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Judgment Rendered: June 8, 2012

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APPEALED FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT  
IN AND FOR THE PARISH OF LIVINGSTON  
STATE OF LOUISIANA  
DOCKET NUMBER 24214, DIVISION "G"

THE HONORABLE ERNEST G. DRAKE, JUDGE

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Scott M. Perrilloux  
District Attorney  
and  
Patricia Parker Amos  
Leslie Burns  
Charlotte Herbert  
Matthew Belsar  
Assistant District Attorneys  
Livingston, Louisiana

Attorneys for /Appellee  
State of Louisiana

Mary E. Roper  
Baton Rouge, Louisiana

Attorney for Defendant/Appellant

**BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.**

**McDONALD, J.**

The defendant, Jonathan Foy, was charged by amended grand jury indictment<sup>1</sup> with one count of aggravated incest of a victim under the age of thirteen years when the offender is seventeen years of age or older, a violation of La. R.S. 14:78.1(D)(2), and pled not guilty. He moved for the appointment of a sanity commission and for a hearing to determine his present capacity to proceed. Following the appointment of a sanity commission, the defense and the State stipulated “as to the reports,” which determined the defendant was “competent and can proceed.” Following a jury trial, the defendant was found guilty as charged by unanimous verdict. He was sentenced to twenty-five years at hard labor without benefit of parole, probation, or suspension of sentence. He now appeals, contending the trial court erred in failing to make a finding as to the defendant’s competency before allowing his case to proceed to trial. For the following reasons, we conditionally affirm the conviction and sentence, and remand this case to the trial court with instructions.

**FACTS**

At trial, the State played the February 10, 2009 recorded interview of the victim, A.M.,<sup>2</sup> by forensic interviewer Christine Roy of the Denham Springs Child Advocacy Center. The victim was five years old. He indicated when he was at “Maw Maw Selena’s and Paw Paw Raymond’s house,” the defendant pulled the victim’s pants down and “put his thing in [the victim’s] butt.” The victim identified the penis on the sketch of a naked boy as “the middle,” and stated the defendant had put that in his butt. The victim stated the defendant then shook the victim’s butt, pulled up the defendant’s pants, and said “let’s watch TV.” The victim indicated the

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<sup>1</sup> The defendant was originally indicted for aggravated rape, a violation of La. R.S. 14:42.

<sup>2</sup> We reference the victim only by his initials. See La. R.S. 46:1844(W).

offense occurred while he was playing hide and seek with the defendant, and the defendant had “done it before.”

The victim’s mother testified she and the defendant had the same mother. She stated the victim’s date of birth was May 23, 2003. During late January or early February of 2009, the victim spent the weekend at the defendant’s home, which was also the victim’s grandmother’s home. When the victim returned to his mother, he cried for days, complained his butt hurt, but would not discuss what had happened to him. Thereafter, he told his mother the defendant had “put something in his backside.”

### **CAPACITY TO PROCEED**

In his sole assignment of error, the defendant contends the trial court erred in failing to make a finding as to the defendant’s competency before allowing his case to proceed to trial because a sanity commission had been appointed. He argues the case must be remanded for the trial court to determine whether or not a retroactive assessment of competency is possible. The State sets forth, “[a]ccording to the trial court record, no actual finding of competency was made by the duty judge on February 11, 2010[.]”

A defendant does not have an absolute right to the appointment of a sanity commission simply upon request. A trial judge is only required to order a mental examination of a defendant when there are reasonable grounds to doubt the defendant's mental capacity to proceed. La. Code Crim. P. art. 643. It is well established that “reasonable grounds” exist where one should reasonably doubt the defendant's capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense. To determine a defendant's capacity, we are first guided by La. Code Crim. P. arts. 642, 643, and 647. **State ex rel. Seals v. State**, 2000-2738 (La. 10/25/02), 831 So.2d 828, 832.

As a general matter, La. Code Crim. P. art. 642 allows “[t]he defendant’s mental incapacity to proceed [to] be raised at any time by the defense, the district attorney, or the court.” The Article additionally requires that “[w]hen the question of the defendant’s mental incapacity to proceed is raised, there shall be no further steps in the criminal prosecution ... until the defendant is found to have the mental capacity to proceed.” La. Code Crim. P. art. 642. Next, La. Code Crim. P. art. 643, provides, in pertinent part, “The court shall order a mental examination of the defendant when it has reasonable ground to doubt the defendant’s mental capacity to proceed.” Last, if a defendant’s mental incapacity has been properly raised, the proceedings can only continue after the court holds a contradictory hearing and decides the issue of the defendant’s mental capacity to proceed. See La. Code Crim. P. art. 647; **State ex rel. Seals**, 831 So.2d at 832-33.

Questions regarding a defendant’s capacity must be deemed by the court to be *bona fide* and in good faith before a court will consider if there are “reasonable grounds” to doubt capacity. Where there is a *bona fide* question raised regarding a defendant’s capacity, the failure to observe procedures to protect a defendant’s right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial. At this point, the failure to resolve the issue of a defendant’s capacity to proceed may result in nullification of the conviction and sentence under **State v. Nomey**, 613 So.2d 157, 161-62 (La. 1993), or a nunc pro tunc hearing to determine competency retrospectively under **State v. Snyder**, 98-1078 (La. 4/4/99), 750 So.2d 832, opinion after remand, 98-1078 (La. 4/14/04), 874 So.2d 739, cert. granted, judgment vacated, case remanded on other grounds, 545 U.S. 1137, 125 S.Ct. 2956, 162 L.Ed.2d 884 (2005), opinion on remand, 98-1078 (La. 9/6/06), 942 So.2d 484, reversed on other grounds, 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008). **State ex rel. Seals**, 831 So.2d at 833.

In certain instances, a nunc pro tunc hearing on the issue of competency is appropriate “if a meaningful inquiry into the defendant's competency” may still be had. In such cases, the trial court is again vested with the discretion of making this decision as it “is in the best position” to do so. This determination must be decided on a case-by-case basis, under the guidance of **Nomey, Snyder**, and their progeny. The State bears the burden in the nunc pro tunc hearing to provide sufficient evidence for the court to make a rational decision. **State ex rel. Seals**, 831 So.2d at 833.

In the instant case, on December 4, 2009, the defense moved for the appointment of a sanity commission to examine the defendant and report on his present mental condition and mental condition at the time of the offense, and for a hearing on his present capacity to proceed.

On December 7, 2009, the trial court appointed Dr. David B. Hale and Dr. Jose Artecona to determine the defendant’s capacity to proceed.

On February 11, 2010, defense counsel indicated he had the reports of Dr. Hale and Dr. Artecona, and both doctors had determined the defendant was “competent and can proceed.” The defense and the State stipulated “as to the reports[.]” The trial court stated, “[s]o ordered.” Thereafter, the matter proceeded to trial.

The record contains the reports of Dr. Artecona and Dr. Hale, but does not contain a ruling by the trial court on the defendant’s mental capacity to proceed.

Therefore, we conditionally affirm the defendant’s conviction and sentence, and remand to the trial court for the purpose of determining whether a nunc pro tunc competency hearing may be possible. If the trial court believes that it is still possible to determine the defendant's competency at the time of the trial on the charge, the trial court is directed to hold an evidentiary hearing and make a competency ruling. If the defendant was competent, no new trial is required. If

the defendant is found to have been incompetent at the time of trial, or if the inquiry into competency is found to be impossible, the defendant is entitled to a new trial. Defendant's right to appeal an adverse ruling is reserved. See Snyder, 750 So.2d at 855-56 & 863; **State v. Mathews**, 2000-2115 (La. App. 1st Cir. 9/28/01), 809 So.2d 1002, 1016, writs denied, 2001-2873 (La. 9/13/02), 824 So.2d 1191, 2001-2907 (La. 10/14/02), 827 So.2d 412.

**CONVICTION AND SENTENCE CONDITIONALLY  
AFFIRMED; REMANDED WITH INSTRUCTIONS.**