STATE OF VERMONT

SUPERIOR COURT Chittenden Unit	CRIMINAL DIVISION Docket No. 3261-9-19 Cncr
State of Vermont v. Aita Gurung, Defendant	

DECISION ON COMPETENCY TO STAND TRIAL

On December 20, 2019, the court held the hearing required by 13 V.S.A. § 4817 to determine whether Defendant Aita Gurung is competent to stand trial. Prior to the hearing, pursuant to 13 V.S.A. §§ 4814–16, Mr. Gurung had been examined by Dr. Jonathan Weker, who found him not competent. At the outset of the hearing, as required by § 4816(e), the court determined that the entirety of Dr. Weker's report is relevant to the determination of Mr. Gurung's competency and so admitted the report into evidence. Neither party made a request to seal; thus the report, previously confidential, now becomes a part of the record, in its entirety. *See* Rules for Public Access to Court Records § 6(b)(4), (c). The court then heard evidence—first from the State, and then from Mr. Gurung. Based on a preponderance of that evidence, the court makes the findings below, and on those findings concludes that Mr. Gurung is not competent to stand trial.

"[T]he bar for incompetency is high: a criminal defendant must lack either a 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' or 'a rational as well as factual understanding of the proceedings against him.' " *United States v. Miller*, 531 F.3d 340, 350 (6th Cir. 2008) (quoting *Drope v. Missouri*, 420 U.S. 162, 172 (1975)). In deciding the issue of competency, the court looks to "a number of factors, including medical opinion, the judge's observations of the defendant, and an attorney's representation about his client's competency." *United States v. Lopez-Hodgson*, 333 F. App'x 347, 354 (10th Cir. 2009). In this matter, all of these factors support the conclusion that Mr. Gurung is not competent.

At the hearing, the State introduced evidence from a well-credentialed expert, Dr. Catherine Lewis. Due to limitations imposed by the Supreme Court's decision in *State v. Sharrow*, 2017 VT 25, 205 Vt. 300, Dr. Lewis was unable to meet with Mr. Gurung to evaluate him for competency. Thus, she and the State both acknowledged that she was not in a position to opine as to Mr. Gurung's competency. Instead, she was limited to reviewing the record and

commenting on Dr. Weker's report. She made a number of observations that, on their face, appear to cast doubt on both Dr. Weker's methodology as well as his observations and conclusions. Some of Dr. Lewis's critiques, however, reflect a misreading, misunderstanding, or disregard of the record; others reflect a cherry-picking of the record; while still others take comments in the record out of context or place undue weight on relatively insignificant observations. In short, viewed in proper context, these critiques do not undermine the court's confidence in either Dr. Weker's approach or his findings.

Dr. Weker also testified. Due to time constraints, he did not have the opportunity to respond to each of Dr. Lewis's critiques, or to explain each of his findings in detail. Nevertheless, he pointed out a number of instances where Dr. Lewis's observations were disproven by the various sources to which she had referred. His explanations were cogent and persuasive. In short, if anything, his response to Dr. Lewis's critiques enhanced the court's confidence in both his approach and his findings. Going into the hearing, if unrebutted, Dr. Weker's report, standing alone, would have been sufficient to persuade the court by a preponderance of the evidence that Mr, Gurung is not presently competent to stand trial. After the hearing, the evidence more strongly supports that conclusion.

Competency is, by its very nature, a matter uniquely suited to expert opinion. Indeed, as noted by the U.S. Supreme Court, the question of competency "is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts." *Drope*, 420 U.S. at 180. While a court may make observations as to a defendant's demeanor and even engage him in conversation, it lacks both the opportunity and the expertise to conduct an in-depth forensic interview. Thus, it must rely principally on the observations of others. Moreover, the question posed in this case—whether Mr. Gurung, as a result of mental illness, has " 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and 'rational as well as factual understanding of the proceedings against him,' " *State v. Bean*, 171 Vt. 290, 294 (2000) (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960))—is substantially beyond the ken of a lay person. *Cf. Pate v. Robinson*, 383 U.S. 375, 386 (1966) (holding that trial court's observations during colloquy at trial were insufficient to evaluate competency given history of mental illness). The best a court can do is to satisfy itself that the experts whose opinions it must evaluate are qualified, that their observations are supported by the record, and that their conclusions flow from those observations. In at least the last of these respects, the court may properly defer to the specialized knowledge and training of

the expert to interpret and explain what otherwise might be inscrutable to the lay person. See Note, *Incompetency to Stand Trial*, 81 Harv. L. Rev. 454, 470 (1967) ("Thus an intelligent determination of a defendant's capacity for rational understanding ought to rest on a deeper and more comprehensive diagnosis of his mental condition than laymen can make through observation of his overt behavior.") (cited in *Drope*, 420 U.S. at 179).

Here, the court finds that Dr. Weker is extremely well-qualified, by virtue of both training and experience. His observations, as set forth in his report and amplified in certain respects in his testimony, are supported by the record. This includes not only the records made available to him before his evaluation but others provided since; it also includes his lengthy interview of Mr. Gurung. And as noted above, in his testimony, Dr. Weker responded persuasively to questions and critiques, enhancing confidence in his findings.

The court notes further that Mr. Gurung's affect at the hearing corroborates some of Dr. Weker's observations. Mr. Gurung appeared passive to the point of being nearly catatonic; he appeared to take no interest, much less participate in any meaningful way in the proceedings. *See* Note, *Incompetency to Stand Trial*, 81 Harv. L. Rev. 454, 470 (1967) ("Thus an intelligent determination of a defendant's capacity for rational understanding ought to rest on a deeper and more comprehensive diagnosis of his mental condition than laymen can make through observation of his overt behavior.") (cited in *Drope*, 420 U.S. at 179). Finally, the court notes that from the outset of the current iteration of this prosecution, Mr. Gurung's counsel has consistently questioned her client's competence. Having seen him throughout the initial iteration of this case, and known how he appeared when competent, her concerns—which mirror the evidence of deterioration in his condition since the reinstitution of this prosecution and his consequent incarceration—warrant consideration. *Drope*, 420 U.S. at 177 n.13 ("Although we do not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client, an expressed doubt in that regard by one with 'the closest contact with the defendant,' is unquestionably a factor which should be considered." (internal citations omitted)).

The court therefore adopts Dr. Weker's findings as its own. Specifically, the court finds that Mr. Gurung presents with manifestations of a major depressive order that raise a substantial concern as to his competency to stand trial. While he appears, barely, to have a sufficient present ability to consult with his attorneys, the initial reservations that Dr. Weker expressed in this regard in his report are enhanced by observations contained in later records. In fact, those records and the comments of his counsel suggest that if anything, Mr. Gurung's condition has

deteriorated since the time of Dr. Weker's evaluation, heightening concerns as to his competency. Due to his depressive disorder, Mr. Gurung exhibits a degree of fatalism as to the outcome of these proceedings that is substantially out of proportion to what would be reasonable under the circumstances and that is not not explainable simply by grief or a sense of moral guilt.

Thus, as explained more fully and eloquently by Dr. Weker in his report, with respect to a factual understanding of the proceedings,

> [Mr. Gurung] had difficulty in calling forth enough of the information presented to him in order to grasp the essential roles of key trial participants and basic trial concepts. . . . [I]t was not clear that, without such enhanced assistance, he would be able to piece together a cogent operational picture of the proceedings. . . . His understanding of appropriate courtroom demeanor and of the sentencing process were distorted, the latter by a disproportionate sense of acquiescence to punishment . . . .

With respect to a rational understanding of the proceedings,

> [Mr. Gurung's] clinical examination indicates that [his] ongoing clinical features [of depression and psychosis] have produced a fatalistic orientation to a degree that impairs his reasoning with respect to determining and acting upon what is in his best interest. . . . [H]is perception of the imperative (and the ultimate value) of countering the accusations being leveled against him would be unduly and irrationally swayed, due to his mental illness, by a disproportionate appraisal of his moral culpability.

In short, the court finds that while Mr. Gurung (barely) has sufficient present ability to consult with his attorneys, he lacks either factual or rational understanding of the proceedings against him, due to his mental illness. Thus, he is presently not competent to stand trial. "Trying an incompetent defendant deprives him of his due process rights to a fair trial under both the Federal and Vermont Constitutions." *State v. Gokey*, 2010 VT 89, ¶ 22, 188 Vt. 500. Accordingly, the court will remove this matter from the trial calendar. 13 V.S.A. § 4817(a).

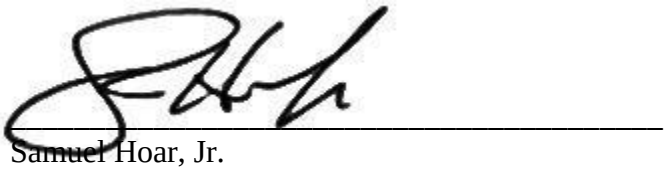
The court notes that in the earlier iteration of these proceedings, after a period of hospitalization, Mr. Gurung was found competent by stipulation of the parties. From that point forward, his condition appears to have improved steadily, only to be reversed by the bringing of these charges and his subsequent incarceration. This observation is not intended as a criticism either of the State in refiling these charges or of the Department of Corrections in its care of Mr. Gurung. Rather, it underlies the hope that the commitment procedure that is now required by 13 V.S.A. § 4820(2) will result again in restoring Mr. Gurung's health to the point where he can again be found competent. *See* 13 V.S.A. § 4817(c).

ORDER

Pursuant to 13 V.S.A. § 4817(b), the court finds Mr. Gurung **incompetent to stand trial**. As required by 13 V.S.A. § 4820(2), the clerk will set a hospitalization hearing to occur within

15 days of this decision; Mr. Gurung will remain in the custody of the Department of Corrections pending that hearing. At that hearing, the court will set the schedule for further review of Mr. Gurung's competency. The case is otherwise removed from the trial calendar unless and until such time as Mr. Gurung is found to be competent to stand trial.

Electronically signed on December 31, 2019 at 04:14 PM pursuant to V.R.E.F. 7(d).



Samuel Hoar, Jr.
Superior Court Judge