Circuit Court for Washington County
Case No. 21K15-51456

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1513

September Term, 2016

LEVAR D. PAYTON

v.

STATE OF MARYLAND

Woodward, C.J.,
Graeff,
Berger,

JJ.

Opinion by Graeff, J.

Filed: April 20, 2018

On September 6, 2016, appellant, Levar D. Payton, was convicted in the Circuit Court for Washington County of two counts of second degree assault of an employee of a State correctional facility. The court sentenced him to two and one-half years on each count, to be served consecutively to each other and to another existing sentence.

On appeal, appellant presents the following questions for our review:

1. Did the trial court err in failing to make a pretrial determination regarding appellant's competency, and by failing to *sua sponte* conduct a competency hearing and/or order another competency evaluation during trial and sentencing?

2. Was appellant's waiver of his right to testify knowing and voluntary?

3. Should the docket and commitment order be amended to reflect the sentence the court imposed?

For the reasons set forth below, we agree that the docket and commitment order must be corrected, and therefore, we shall order a limited remand for those corrections. Otherwise, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The assaults for which appellant was convicted occurred on November 25, 2014. On April 7, 2015, after a hearing, the District Court ordered appellant committed to the Department of Health and Mental Hygiene ("DHMH") for examination as to his competency to stand trial.[1] According to the commitment order, the "Defendant started speaking about a television."

[1] Appellant initially was charged in the District Court of Maryland.

On July 6, 2015, Dr. Janet L. Hendershot, a psychologist with the Office of Forensic Services of DHMH, submitted an evaluation report to the Circuit Court for Washington County. Dr. Hendershot ultimately concluded, after evaluations conducted on April 23, 2015, and June 3, 2015, that appellant possessed "a rational and factual understanding of the proceedings against him or a present ability to consult with an attorney with a reasonable degree of rational understanding."

In reaching this assessment as to appellant's competency to stand trial, Dr. Hendershot considered appellant's personal history, legal history, psychiatric history, mental status, as well as the context for the evaluation, i.e., an evaluation of his competence to stand trial. Dr. Hendershot noted that, when appellant arrived at the Maryland Division of Corrections on February 19, 2013, regarding a charge for unlawful taking or moving a car and possession of a weapon, he was seen by mental health staff. Documentation from the Howard County Detention Center "indicated a history of suicide attempts and assaults on staff." Appellant was placed on the "high risk list" for housing, and he was referred to the Patuxent Assessment Unit ("Patuxent"). There were, however, no signs of psychosis or mania and no evidence of mood or thought disorder.

In May 2013, appellant was transferred to Maryland Correctional Institution – Hagerstown ("MCI-H"), where he was diagnosed with Mood Disorder Unspecified, but no medication was prescribed. It was determined that no referral to the psychiatry clinic was required.

Appellant was transferred to North Branch Correctional Institution ("NBCI") and seen for intake on March 21, 2014, following his complaints of anxiety and depression. In

June 2014, appellant was placed on suicide watch, but when he was evaluated, he denied having suicidal and homicidal ideations, as well as psychosis, and his thoughts were organized. Dr. Hendershot's report stated that, "[o]ther than his self-report, [appellant] displayed no evidence of psychosis, formal thought disorder or suicidal ideations."

On October 24, 2014, appellant was sent to Jessup Correctional Institution ("JCI") for dental work. While there, he tied one end of a sheet around his bed and the other end around his neck. Appellant subsequently was transferred to Patuxent for further evaluation. During the time he was there, he was "minimally cooperative and did not show any behavior consistent with psychosis or thought disorder."

On December 1, 2014, appellant was seen for a psychiatry follow-up because he was under observation for assaulting an officer during transport. Appellant claimed that he was having "auditory hallucinations." Although it was determined that "psychosis was highly unlikely to be genuine," appellant was prescribed a trial of Tegretol to decrease his "irritability, aggressiveness and mood lability." This medication eventually was discontinued on December 18, 2014, when it was determined that appellant had not completed the required lab work.

In concluding the psychiatric history portion of her evaluation, Dr. Hendershot stated:

> Mr. Payton has a long history of claiming suicidality both with and without the commission of suicidal gestures. He also has a history of claiming to hear voices; however, his reports are atypical and he has not

> appeared to be attending to internal stimuli.[2] Mental health providers at NBC-I and CHMC-J doubted the validity of his claims of auditory hallucinations. Mr. Payton spent considerable time on special precautions for suicide observation; however, it was reported that he was trying to get a single cell. He has also spent considerable time on disciplinary segregation secondary to numerous assaults on staff. Current diagnoses include depressive disorder, generalized anxiety disorder, cannabis dependence unspecified, alcohol dependence, amphetamine dependence and antisocial personality disorder. He also has a history of major depressive disorder single episode unspecified and mood disorder not otherwise specified, which have both been resolved. None of his current or past diagnoses are classified as serious mental disorders and it was believed that his acting out behavior has been the result of his antisocial personality disorder. He continues to be on no psychotropic medications.

During the evaluations themselves, Dr. Hendershot observed that appellant was "alert and oriented" and understood the purpose of the evaluation. Appellant informed her that he thought about suicide "daily," and that he had made attempts to bring that to fruition. Appellant also reported that he had thoughts about hurting others, including inmates and officers. But, Dr. Hendershot noted, "[o]ther than self-report, there was no indication that [appellant] was imminently at risk of physically acting out against self or others."

Dr. Hendershot also observed that appellant was "fairly cooperative" during the evaluation and was able to respond to questions and volunteer information. His tone was "respectful" and "calm." At one point, while discussing possible pleas, appellant stated: "I don't want that little girl around me that little girl with dreadlocks; she's been practicing witchcraft on me that's why I don't sleep at night." There was, however, no "other indication that he was experiencing auditory hallucinations." Specifically, he did not

[2] Dr. Henderson noted that, at the June 3, 2015, interview with her, appellant stated that he "got voices in [his] head," but "there were no overt signs that he was seeing things or hearing voices."

appear distracted except for one occasion when a nurse who he previously had tried to contact walked by.

Dr. Hendershot noted that appellant's "[c]ognitive functioning appeared to be intact." He was able to spell the word "world," he was able to count backwards from 100 by 7's, with only one error, and he was able to provide similarities between pairs, such as apple and orange. He also exhibited judgment in relation to two hypotheticals, indicating that, if he saw smoke and fire in a crowded theater, he "would try to help the people out in a calm manner," and if he found a stamped, sealed, and addressed envelope lying in the street, he would "[p]ut it in the mailbox."

Based on these evaluations, Dr. Hendershot concluded that appellant appreciated the specific allegations in the case, noting that, when he was asked about his current charge, he stated that he was "charged with second degree assault" for "assaulting staff." Appellant knew that the possible penalties could be "10 years each," and "20 years consecutive," which was true because there were two counts of second degree assault with a maximum penalty of 10 years. Dr. Hendershot further noted that appellant had "extensive experience with the legal system," and he was aware of the primary participants in a courtroom, the adversarial nature of the proceedings, and the distinction between fact finders in a bench trial and a jury trial. Dr. Hendershot was of the opinion that appellant was "able to work with an attorney to aid in his defense if/when he chooses."

Although correctional services staff had deemed appellant dangerous and subject to segregation, Dr. Hendershot concluded that appellant's "history of acting out behavior has been for secondary gain, e.g., in an attempt to get a single cell or transfer to a different

facility." Dr. Hendershot believed that, "when it suits his needs, [appellant] is able to cooperate as he did during the current evaluations." Appellant's "behavior is volitional and he is able to comport himself to what is expected in the courtroom if he so chooses."

Dr. Hendershot further opined that appellant would be able to testify in a relevant manner, observing that he was "very articulate" when he "chose to be cooperative." Dr. Hendershot did note, however, that appellant "also attempted to malinger a mental illness to avoid completing the evaluation during the initial interview." As indicated, the evaluation concluded that appellant "does possess a rational and factual understanding of the proceedings against him or a present ability to consult with an attorney with a reasonable degree of rational understanding."

On September 2, 2015, prior to trial, appellant's defense counsel filed in the circuit court a plea of not criminally responsible ("NCR") and incompetency to stand trial. Appellant also moved for a mental examination to assist in his plea. Following this request, the circuit court issued another order directing that appellant again be evaluated by DHMH.

On September 28, 2015, Dr. Hendershot submitted a second evaluation report, indicating that she evaluated appellant again on September 18, 2015. This second report was similar to that recounted above, with additional details about the underlying assault offense included. This report came to the same conclusion that appellant was competent to stand trial.[3]

[3] Dr. Hendershot also concluded that appellant had not met his burden of establishing the defense of not criminally responsible. Although Dr. Hendershot's conclusion in this regard does not have a bearing on the issue presented here, *see Mack v.*

On January 14, 2016, the parties and appellant appeared for a hearing. Defense counsel indicated that the case was set in for a competency review and then stated as follows:

> [T]here was an evaluation done by Dr. Hendershot for the Court and also the Public Defender in Allegany County had an evaluation done by a Dr. Craft. And I received that [] December 16th. And that indicates that there is no medical basis for the competency issue. I have nothing further on that issue.[4]

After further discussions about a continuance of trial and the charges involved, the court replied:

> The [] report from the Department that was filed here on October the 2nd, 2015 finds that the defendant is competent and responsible. Under the circumstances, I will grant a continuance in this matter. Good cause is found to continue the State versus Levar Payton, 21-K-15-51456 to March 29, 2016.[5]

State, 166 Md. App. 670, 682 ("[A] plea of not criminally responsible has no bearing on an accused's competency to stand trial."), *cert. denied*, 392 Md. 725 (2006), her factual findings are relevant. Dr. Henderson stated that, "[a]though [appellant] reported hearing voices around the time of the alleged instant offense, there was no overt evidence of psychosis. Yet, he has often made this claim when discussing his acting out behavior. Malingering is not considered a mental illness." She further stated that "the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) . . . describes malingering as the intentional production of false or grossly exaggerated physical or psychological problems."

[4] At sentencing, defense counsel proffered that Dr. Craft "was unable to find [appellant] incompetent or not criminally responsible."

[5] The docket entries state: "Defendant found competent" at this hearing. The case was continued two more times before trial on September 6, 2016.

Trial commenced on September 6, 2016. During voir dire of the prospective jurors, appellant made a number of statements that he now argues required the court, *sua sponte*, to order another competency evaluation.

At the end of the general questions to the jury panel as a whole, prior to bringing the jurors up individually, the court asked appellant, his attorney, and the attorneys for the State to approach. Appellant said something about suicide,[6] and when the court asked counsel about that, defense counsel stated: "We . . . you know, obviously I've filed NCR. Cumberland's filed . . . the PD in Cumberland also in their own case, has filed NCR. And he's been evaluated by the State and by a private . . . private psychiatrist."

Appellant also points to incidents that occurred when individual jurors were called to the bench. When Juror number 227 approached, the following occurred:

> THE COURT: Okay. Good morning, sir. Juror 227, I want to make sure I can hear you. You said you feel . . . you feel strongly just about the nature of the charges in this case?
>
> JUROR 227: Not the nature of the charges. My next door neighbor worked for MCTC. My mentor as a Mason was the Warden down at Roxbury. My next door neighbor is a D.C. police officer. My other next door neighbor is a State Police officer. And I'd be prejudiced against this witness.
>
> THE COURT: Okay.
>
> DEFENDANT: Yeah. I've been street banging all my life.
>
> THE COURT: Thank you, sir. You may stand back.
>
> DEFENDANT: I'm tired of Christians . . . .

[6] The transcript includes multiple references to "unintelligible."

(Whereupon Juror 227 returns to his seat and the following proceedings take place out of the hearing of the jury:)

DEFENDANT: Retired correctional . . . .

[DEFENSE COUNSEL]: Move to strike for cause.

THE COURT: So, without a motion . . . .

DEFENDANT: Christian . . . no (unintelligible). No Muslims . . . Christian.[7]

Appellant also spoke out during questioning of Juror number 21:

THE COURT: . . . Juror 21, you indicated you or a family member had been convicted of something?

JUROR 21: I had a dwi twenty-five years ago.

THE COURT: You had a dwi twenty-five years ago?

JUROR 21: Uh huh.

THE COURT: Okay.

JUROR 21: I had a brother . . . .

COURT REPORTER: I'm having problems picking her up. I'm sorry.

JUROR 21: I'm sorry. And I had a brother that was in prison in Franklin County for . . . .

THE COURT: Would that . . . either of those experiences cause you to be unable to reach a fair and impartial . . . .

DEFENDANT: I want to (unintelligible)

THE COURT: Verdict based solely on the evidence in this case?

[7] The court struck Juror 227 for cause. We note that, during voir dire, appellant communicated with counsel, including discussing where to stand during questioning of the prospective jurors at the bench.

JUROR 21: No.

THE COURT: [Prosecutor], any questions . . .

DEFENDANT: And I'll put that on the radio.

THE COURT: For Juror . . .

[PROSECUTOR]: No questions, your Honor. It's Number 21.

In addition, appellant directs our attention to remarks he made when Juror number 271 approached. At that time, appellant blurted out "(unintelligible) in jail with the white. My uncle is married to a white woman."

During trial, Officer Nathaniel Ritz and Officer Qwan Finch, transport officers with the Department of Public Safety and Correctional Services, testified that, on November 25, 2014, appellant was being transported from one correctional facility to another, and when Officer Ritz removed appellant's handcuffs, appellant punched him in the neck with his right fist. When Officer Finch tried to come to Officer Ritz's aid, appellant struck Officer Finch with a closed fist. Other eyewitnesses to the incident, Officer Shawn Ryan and Officer Nathen Grabenstein, corroborated this testimony.

Defense counsel then requested to advise appellant at the bench about his right to testify. Counsel stated that they had discussed his right to decide whether to testify, and counsel stated: "And I believe you've indicated you want to testify." Appellant shook his head "no," and after the court requested that appellant answer verbally, the following occurred:

> DEFENDANT: (unintelligible) and a mouse said for me not . . . I've got my voodoo, my witchcraft and they say I don't. My (unintelligible) says don't talk. So what am I to do?

[DEFENSE COUNSEL]: Well . . . .

THE COURT: [Defense counsel] . . . .

[DEFENSE COUNSEL]: When we started . . . when we started, I anticipated you were going to get up and answer my questions. You know, I did advise you to do that but you don't have to. So, it's your choice.

THE COURT: If you decide to testify you could be impeached potentially with things like you might have done in the past.

[DEFENSE COUNSEL]: Right.

THE COURT: If you elect not to testify, I would instruct the jury not to hold that against you and have no inference about why you didn't testify.

[DEFENSE COUNSEL]: You do not. You're indicating you do not want to testify.

THE COURT: Okay. You're shaking your head no. Does that mean you do not want to testify? I'd rather hear it because I'm not sure whether shaking your head no means you want to testify or not. Can you tell me? Do you want to testify? Yes or no? Shaking his head no. Alright. I'll interpret that as a . . . electing to not testify and if requested I would give the jury [an instruction] on that.

[DEFENSE COUNSEL]: Right. I'm going to be asking for it. I put it in my instructions.

THE COURT: You may stand back.[8]

The jury found appellant guilty of both counts of second degree assault, and the court immediately proceeded to sentencing. Appellant was given an opportunity to allocute. Both appellate counsel agree that appellant made nonsensical statements at this time. For example, appellant stated:

[8] The jury was instructed that appellant had an "absolute constitutional right not to testify," and that his decision not to testify should not be held against him or considered by the jury.

And two celebrity squares and knowing that Numidame (sic.) is not prophesizing at this . . . these matters, I'm not prophesizing that they're supposed to.

* * *

Someone just reminded me that Social Security start at forty-five and went up to sixty-five. And it moved . . . I believe it moved up to like seventy/seventy-four now.

* * *

So, (unintelligible) man, I'm inside this thing. I don't deny . . . you don't deny. It's heavy . . . it's heavy over there in what's that (unintelligible). Then away with the Arabs, Saudi Arabia, Israel, you know, China. I don't know where he was born at. I got Alice in Wonderland over here. We have Lion King and we have Abbatoir.

The court then stated the following:

Alright. Mr. Payton, let me . . . let me interrupt you because it's . . . it's pretty patently obvious that there's a mental health disability you're laboring under. It's a tough standard in Maryland to be criminally . . . to not be found criminally responsible. You basically have to have no knowledge whatsoever that what you're doing is wrong. I'm paraphrasing a lot of case law.

Criminal competence to stand trial, it's the burden of the State to make sure you are competent. And what [defense counsel] has said, there's been at least two doctors that have evaluated you despite your mental illness that . . . and a suicide attempt and being at Patuxtent [sic] where you . . . you have to have mental illness to get in Patuxtent. [sic] A lot of people in the Division of Correction's general population have diagnoses with bipolar or depression and they don't make it to Patuxtent. [sic] But you did.

So, I'm convinced that you've got something that is hurting you as far as helping you conform your behavior. But there's a prior assault in the Division of Correction of an officer in 2013, a prior assault on police. Threats . . . possession of a gun. And I don't know what else to do, sir, but try to emphasize again that taking a swing at a correctional officer or in this case two of them is so far out of bounds as to . . . the [c]ourt needs to do everything it can to try to prevent that type of harm.

As indicated, the court imposed consecutive sentences of two and one-half years. This appeal followed.

DISCUSSION

I.

Appellant contends that the trial court "erred by failing to make a pretrial determination regarding [his] competency and by failing to *sua sponte* conduct a competency hearing and/or order another competency evaluation during trial and sentencing." The State disagrees, arguing that the court properly found appellant "competent to stand trial and in proceeding with trial and sentencing."

A.

Competency to Stand Trial

The Due Process Clause of the Fourteenth Amendment to the United States Constitution "prohibits the criminal prosecution of a defendant who is not competent to stand trial." *Medina v. California*, 505 U.S. 437, 439 (1992). The Court of Appeals has explained "'that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial.'" *Kennedy v. State*, 436 Md. 686, 692 (2014) (quoting *Drope v. Missouri*, 420 U.S. 162, 171 (1975)). "Incompetent to stand trial" is defined as "not able": "(1) to understand the nature or object of the proceeding; or (2) to assist in one's defense." Md. Code (2016 Supp.) § 3-101(f) of the Criminal Procedure Article ("CP").

Competency to stand trial "is much more a function of rationality than of mental health generally." *Muhammad v. State*, 177 Md. App. 188, 259 (2007), *cert. denied*, 403 Md. 614 (2008). "It is far more a matter of raw intelligence than it is of balanced psychiatric judgment or legal sanity or of mental health generally." *Id*. Moreover, there are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Drope*, 420 U.S. at 180.

"A person accused of a crime is presumed to be competent to stand trial." *Peaks v. State*, 419 Md. 239, 251 (2011). When an accused's competency to stand trial is in question, CP § 3-104 provides the actions to be taken by the court, as follows:

> (a) *In general.* – If, before or during a trial, the defendant in a criminal case or a violation of probation proceeding appears to the court to be incompetent to stand trial or the defendant alleges incompetence to stand trial, the court shall determine, on evidence presented on the record, whether the defendant is incompetent to stand trial.
>
> (b) *Court action if defendant found competent.* – If, after receiving evidence, the court finds that the defendant is competent to stand trial, the trial shall begin as soon as practicable or, if already begun, shall continue.
>
> (c) *Reconsideration.* – At any time before final judgment, the court may reconsider the question of whether the defendant is incompetent to stand trial.

The statute establishes the "proper procedure the trial court must follow when determining a criminal defendant's competence to stand trial." *Kennedy*, 436 Md. at 693. The intent of this procedure is to assure that, "for every accused[] whose competency was called into question, to have at least one guaranteed review of his or her competency status." *Roberts v. State*, 361 Md. 346, 366 (2000). *Accord Stewart-Bey v. State*, 218 Md.

App. 101, 118 (2014). Ultimately, "the obligation with respect to a determination of competency rests with the court and not the defendant." *Sibug v. State*, 445 Md. 265, 304 (2015).

A court's duty to determine the accused's competency to stand trial "'is triggered in one of three ways: (1) upon motion of the accused; (2) upon motion of the defense counsel; or (3) upon a *sua sponte* determination by the court that the defendant may not be competent to stand trial.'" *Wood v. State*, 436 Md. 276, 287 (2013) (quoting *Thanos v. State*, 330 Md. 77, 85 (1993)). Competency to stand trial is a factual determination that will "'not be reversed unless it is clearly erroneous.'" *Kennedy*, 436 Md. at 693 (quoting *Peaks*, 419 Md. at 252). Once the duty is triggered, CP "§ 3-104(a) mandates that 'the court *shall* determine whether the defendant is competent to stand trial.'" *Gregg v. State*, 377 Md. 515, 527 (2003) (quoting *Roberts*, 361 Md. at 366).

B.

Pretrial Determination

Here, the issue of appellant's competence was triggered pretrial by defense counsel's request for an evaluation to support a plea of NCR and incompetency to stand trial.[9] The State contends, however, that "defense counsel effectively withdrew the competency claim and rendered the issue moot." In support, it points to defense counsel's statements at the hearing, in which counsel acknowledged that the evaluations by two

[9] As appellant notes, the District Court initially ordered an evaluation of appellant's competence to stand trial. This did not, however, trigger the circuit court's duty to make a competency determination. *See Gregg v. State*, 377 Md. 515, 543 (2003).

doctors "indicates that there is no medical basis for the competency issue," and "I have nothing further on that issue." Appellant argues that counsel never expressly withdrew his competency claim, and the State's claim that he effectively did so "is contradicted by the record."

In *Wood*, 436 Md. at 281-82, defense counsel initially requested a competency evaluation, but he subsequently informed the court that Wood refused to cooperate with the examination and counsel was withdrawing the issue of competency. The Court of Appeals held that a defendant can withdraw a request for a competency evaluation, and that this action rendered the issue of competency moot, "so long as the trial judge did not have a bona fide doubt that [the accused] was competent based on evidence presented on the record." *Id.* at 287-88. Evidence relevant to whether there is a bona fide doubt as to the accused's competence includes "'evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial.'" *Id.* at 291 (quoting *Gregg*, 377 Md. at 528).

The Court noted that "the record demonstrate[d] that [Wood] was afforded an opportunity to be heard, and there was sufficient evidence on the record for the trial court to discern [Wood's] competence." *Id.* at 288-89. It also noted that there was "a reasonable inference" that the judge gave credence to the fact that defense counsel withdrew the request for a competency evaluation. *Id.* at 290. It stated:

> The United States Supreme Court has stated that defense counsel is often the person with the "best-informed view" of his client's ability to participate in his own defense. *Medina v. California*, 505 U.S. 437, 450, 112 S.Ct. 2572, 2580, 120 L.Ed.2d 353, 366 (1992); *see also Thanos v. State*, 330 Md. 576, 586, 625 A.2d 932, 936 (1993) (Thanos II) ("A lawyer who has

> been acquainted with a client for months will be much more familiar with the client's mental state than a judge who has just met the defendant at trial."). Because "judges must depend to some extent on counsel to bring issues into focus[,]" *Drope*, 420 U.S. at 176-77, 95 S.Ct. at 906, 43 L.Ed.2d at 116, it is reasonable to conclude that the trial judge credited defense counsel's judgment to revoke his request for a competency evaluation as evidence in favor of a continued presumption of [Wood's] competence.

Id. The Court ultimately held that, because there was no evidence that created a bona fide doubt that Wood was competent to stand trial, the court was not required to make a determination of competency, and the court did not err in finding the issue moot. *Id.* at 292.

Here, unlike in *Wood*, defense counsel did not specifically withdraw the issue of competency. Rather, he stated that the competency evaluation "indicates that there is no medical basis for the competency issue," and "I have nothing further on that issue." Moreover, the circuit court did not view the statement as a withdrawal of the issue and did not state that the issue was moot.

Rather, as the State notes, the court made a determination, albeit implicitly, on the competency issue. The court stated: "The [] report from the Department that was filed here on October the 2nd, 2015 finds that the defendant is competent and responsible. Under the circumstances, I will grant a continuance in this matter."

Appellant contends that the court did not determine competency as required by CP § 3-104(a), asserting that the court must make an explicit determination that an accused is competent to stand trial. We disagree.

CP § 3-104(a) requires the court to determine competency "on evidence presented on the record." The statute does not require that the determination of competency be

announced on the record. *Cf.* Md. Rule 4-215(b) (court may not accept waiver of right to counsel until the "court determines and announces on the record" that the waiver is knowing and voluntary). Thus, if the statute is triggered, the determination must be made "on evidence presented in the record," *Kennedy*, 436 Md. at 702 n. 6, but the defendant's competency need not be "explicitly determined on the record." *Wood*, 436 Md. at 292 n. 5. *Accord Peaks*, 419 Md. at 257 (a competency "determination need not be made explicitly in a separate hearing.").[10]

Here, appellant was given a competency evaluation and "afforded an opportunity to present evidence upon which a valid determination [could] be made." *Roberts*, 361 Md. at 356. The only evidence "on the record" was the evaluations finding appellant to be competent. *See Sangster v. State*, 312 Md. 560, 568 (1988) (report of competency evaluation is provided to the court, and therefore, it constitutes "evidence on the record," even if not offered as an exhibit at the hearing). Based on this evidence and defense counsel's concession that there was no medical basis to find appellant incompetent to stand

[10] *Sibug v. State*, 445 Md. 265 (2015), upon which appellant relies, is distinguishable from this case. Sibug was found incompetent to stand trial in 1999. *Id.* at 268. At his trial in 2008, after psychiatrists determined him to be competent, Sibug did not contest his competence to stand trial, and the court did not make a competency determination. *Id.* at 305-06, 315. The Court of Appeals held that, because the court had found Sibug incompetent in 1999, the court needed to make a finding of competency at the time of the 2008 trial, and such determination "necessitates an explicit judicial determination when the issue is in doubt." *Id.* at 315-16. Here, there was no prior finding of incompetency, and given the record at the time, including the multiple evaluations finding appellant competent, but attempting to "malinger a mental illness," there was no basis for doubt about appellant's competence.

trial, the court found that appellant was competent and continued trial at defense counsel's request. We perceive no error in this regard.

C.

Trial and Sentence

Appellant next contends that, even if the court properly found him to be competent at the beginning of the trial, the court erred "in failing to *sua sponte* conduct a competency hearing and/or order another competency evaluation during trial." He asserts that his behavior at trial, plus knowledge that defense counsel doubted his competence and Dr. Hendershot's reported history of suicidal ideations, raised a bona fide doubt about his competence.

The State disagrees. It contends that appellant's conduct did not trigger the circuit court's duty to raise competency *sua sponte*.

A court's duty to determine competency arises "upon a *sua sponte* inquiry by the court triggered by the court's concern as to the defendant's competency to stand trial." *Gregg*, 377 Md. at 527. Indeed, CP § 3-104(c) "authorizes a judge to reevaluate a defendant's possible incompetence, after the defendant has been determined competent under 3-104(a)." *Peaks*, 419 Md. at 259. A reconsideration under CP § 3-104, however, is discretionary. *Id. Accord Stewart v. State*, 65 Md. App. 372, 377 (1985) ("The language is clear that a reconsideration of competency is discretionary. There are no requirements for an additional hearing to make findings of fact and conclusions of law"), *cert. denied*, 305 Md. 599 (1986).

Several cases have considered, and rejected, a claim that a court should have *sua sponte* ordered a competency evaluation. In *Gregg*, after the District Court ordered a competency evaluation, and a psychiatrist concluded that Gregg was not competent to stand trial, the District Court determined at a subsequent competency hearing that Gregg was competent to stand trial. *Id.* 518, 520, 522-23. Gregg subsequently prayed a jury trial, and the case was transferred to circuit court, where Gregg waived his right to counsel and was convicted of second degree assault. *Id.* at 523. On appeal, Gregg argued that his "bizarre" behavior at trial and his mental illness triggered the circuit court's duty to conduct a competency hearing. *Id.* at 524.[11] The Court of Appeals held that this, and other examples of "strange" and "erratic" behavior, fell "short of crossing the threshold triggering the judge's *sua sponte* duty to evaluate Gregg's competency to stand trial." *Id.* at 545. The Court concluded that there was nothing in the record "indicating that Gregg lacked the 'sufficient present ability to consult with his attorneys with a reasonable degree of rational understanding or factual understanding of the proceedings.'" *Id.* at 546 (quoting *Ware v. State*, 360 Md. 650, 706 (2000)). The Court noted that the "behavior indicated in this record [was] significantly less egregious than that found by us in other cases *not* to trigger the obligation." *Id.* at 545.

In one of those cases, *Thanos*, 330 Md. at 83, the circuit court sentenced Thanos to death, despite evidence of Thano's history of mental incapacity, mental disorder, and

[11] Gregg pointed to a colloquy between himself and the court during which he stated that if he stood to address the court, he would not be able to stand later during the proceedings, explaining that he did his "maximum walking at three" that morning. *Gregg*, 377 Md. at 529-30.

emotional disturbance. On appeal, Thanos argued that the trial court erred by failing to *sua sponte* inquire into his competency, given his strange behavior at trial and sentencing, including his comment that he would be 200 years old "in dog years," and his question whether he would be sentenced to death "by gas, or by roo-roo?" *Id.* at 85.

The Court of Appeals held that, upon its independent review of the record, there was no indication that the trial court erred in failing to grant Thanos a competency hearing *sua sponte*. *Id.* at 86. Although "Thanos did make some peculiar remarks to the trial judge, his words on the whole were very lucid. He appeared to grasp all of his rights as they arose throughout the proceedings." *Id.* The Court noted that none of Thanos's four expert witnesses at sentencing ever suggested that he was incompetent, none of his defense attorneys alleged that he was incompetent, and a review of the trial proceedings indicated that Thanos "exhibited both 'present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as a factual understanding of the proceedings against him.'" *Id*. at 86-87 (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)).

In *Peaks*, 419 Md. at 245, defense counsel entered an NCR plea and requested an evaluation to determine whether Peaks was competent to stand trial. The circuit court ordered an evaluation, which concluded that Peaks was competent for trial. *Id.* at 246. When the case first came up for trial, one circuit court judge found that Peaks was competent to stand trial, but the case was postponed because Peaks complained of chest pains. *Id*. at 246-47. When trial was set to resume, Peaks again "began to act out," insisting that he was being "railroaded" by the government, and cursing and acting erratically. *Id.*

at 247-48. The court advised that it was going to issue an order for Peaks to be evaluated again for competency and criminal responsibility. *Peaks*, 419 Md. at 248. The evaluation was not completed, however, because Peaks declined to cooperate with the evaluating doctors. *Id*. at 249.

Trial eventually began approximately six months later before a different judge. *Id.* at 249. The issue of competency was not raised, and Peaks was allowed to discharge counsel. *Id*. Once voir dire of the prospective jurors began, Peaks then "began to act out, yelling in court, using profanities and indicating his belief that the system was fixed against him." *Id*. Peaks ultimately was removed from the courtroom. *Id*. at 250. The next day, Peaks was given an opportunity to participate in his trial, but he "told the court multiple times that he did not want to participate," and he was excused from the courtroom. *Id.* The State raised the issue of Peaks's competency, to which the trial judge responded: "I'm satisfied that he is competent to stand trial. Without any doubt am I satisfied." *Id.* Peaks was then tried in absentia. *Id*.

On appeal, Peaks asserted that the trial judge erred in failing to determine the issue of his competency prior to trial. *Id.* at 251. The Court of Appeals disagreed, stating that the initial judge had determined Peaks' competency, and there was not sufficient evidence to rebut this earlier determination of competency. *Id.* at 261. It noted that the trial judge "could observe that Peaks was competent and that Peaks's unruly behavior was the result of his desire to manipulate or disrupt the court proceedings, and not sufficient or credible evidence of incompetence." *Id.*

Similarly, in *Trimble v. State*, 321 Md. 248, 255 (1990), the circuit court found

Trimble competent prior to trial. During his trial, however, Trimble "behave[d] strangely," i.e., he wore a red cross painted on his shaved head, stuck out his tongue, rolled his head, and made obscene gestures to the jury. *Id.* The Court of Appeals rejected the argument that the court erred by failing to conduct another competency hearing, noting that "any questions posed directly to [Trimble] at trial were answered appropriately," and the "trial judge could have concluded that [Trimble's] behavior was designed only to disturb the proceedings and was not the result of any real incompetency." *Id.* at 256.

Here, Dr. Hendershot evaluated appellant on three separate occasions prior to trial. She concluded, in two separate reports that are included with the record on appeal, that appellant understood the proceedings against him and had the present ability to assist his attorney.[12] She also indicated that appellant made claims of hearing voices, although there was no overt evidence of psychosis, and she stated that appellant's history of acting out had been for "secondary gain," and he attempted to malinger mental illness, i.e, produce false or exaggerated problems.

Given these reports, and the fact that defense counsel never requested that the court revisit the issue of competency, the circuit court, who was able to observe appellant during the trial, reasonably could have concluded that appellant was making strange statements for secondary gain, i.e., to taint his trial and get his conviction and sentence reversed. We

[12] Defense counsel further proffered that appellant was seen by another doctor, a Dr. Craft, who appeared to have come to the same conclusion.

perceive no abuse of discretion by the circuit court in failing to order a fourth competency evaluation on this record.[13]

II.

Appellant next contends that the court erred in finding that his waiver of his right to testify was knowing and voluntary. The State contends that, because appellant was represented by counsel, the court was under no obligation to advise him in this regard, and the waiver was otherwise knowing and voluntary.

The colloquy regarding appellant's waiver of the right to testify was as follows:

> [DEFENSE COUNSEL]: Can I advise him up here as to . . . .
>
> THE COURT: Sure. Mr. Payton, will you come over please?
>
> [DEFENSE COUNSEL]: Mr. Payton, there are three things you get to decide as we've talked about before: How you plead. Whether you have a trial with a jury. And now this is the third thing, which is to testify. And I believe you've indicated you want to testify. Is that correct?
>
> DEFENDANT: (Shaking head no.)
>
> [DEFENSE COUNSEL]: You do not. Now, do you understand that's your . . . .
>
> COURT REPORTER: Can you ask him to please speak.

[13] The court's remarks after appellant's allocution at sentencing, stating that "it's pretty patently obvious that there's a mental health disability you're laboring under," does not persuade us otherwise. Competency to stand trial "is more a function of rationality than of mental health generally." *Muhammad v. State*, 177 Md. App. 188, 259 (2007), *cert. denied*, 403 Md. 614 (2008). *See People v. Duffy*, 4 N.Y.S.3d 394, 395 (N.Y. App. Div. 2015) ("[A] defendant is presumed competent and, absent reasonable grounds to believe that he or she is incapable of understanding the proceedings due to a mental disease or defect, a court is not required to order a competency hearing based solely upon a history of substance abuse or mental illness.")

THE COURT: For the record, Mr. Payton is shaking his head no. But Mr. Payton, if you can answer verbally.

DEFENDANT: (unintelligible) and a mouse said for me not . . . I've got my voodoo, my witchcraft and they say I don't. My (unintelligible) says don't talk. So what am I to do?

[DEFENSE COUNSEL]: Well . . . .

THE COURT: [Defense counsel] . . . .

[DEFENSE COUNSEL]: When we started . . . when we started, I anticipated you were going to get up and answer my questions. You know, I did advise you to do that but you don't have to. So, it's your choice.

THE COURT: If you decide to testify you could be impeached potentially with things like you might have done in the past.

[DEFENSE COUNSEL]: Right.

THE COURT: If you elect not to testify, I would instruct the jury not to hold that against you and have no inference about why you didn't testify.

[DEFENSE COUNSEL]: You do not. You're indicating you do not want to testify.

THE COURT: Okay. You're shaking your head no. Does that mean you do not want to testify? I'd rather hear it because I'm not sure whether shaking your head no means you want to testify or not. Can you tell me? Do you want to testify? Yes or no? Shaking his head no. Alright. I'll interpret that as a . . . electing to not testify.

An accused in a criminal case has the right to choose whether or not to testify on his own behalf. *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987). As this Court has explained:

> The decision whether or not to testify is a significant one and must be made with a basic appreciation of what the choice entails. If a defendant elects to remain silent, he or she waives the constitutional right to testify on his or her own behalf. Conversely, if a defendant testifies, he or she waives the constitutional right to remain silent.

Gregory v. State, 189 Md. App. 20, 33 (2009) (quoting *Morales v. State*, 325 Md. 330, 335-36 (1992)).

Here, appellant clearly choose not to testify by shaking his head no in response to the court's question whether he wanted to testify. The question is whether the court properly accepted this decision.

"There is no provision in the Maryland Rules requiring that a defendant's waiver of his constitutional rights to testify or to remain silent be obtained in a prescribed fashion, be placed on the record, or be made in open court." *Tilghman v. State*, 117 Md. App. 542, 555 n. 5 (1997), *cert. denied*, 349 Md. 104 (1998). If a defendant is represented by counsel, a presumption arises that counsel has fully advised his client of the right to testify or remain silent. *Savoy v. State*, 218 Md. App. 130, 148 (2014). *Accord Thanos*, 330 Md. at 91-92.

There may be times, however, "when a court has a duty to act, even when a defendant is represented by counsel." *Savoy*, 218 Md. App. at 149. For example, in *Hamilton v. State*, 79 Md. App. 140, 150-51, *cert. denied*, 316 Md. 550 (1989), where, in response to questioning by the court, it was clear that Hamilton, who "had a limited intellectual and comprehension ability," did not understand that guilt could not be inferred from his failure to testify, the court was required to "take some further action to assure itself that the defendant . . . [understood] the nature and consequences" of his waiver.

In *Tilghman*, 117 Md. App. at 561, this Court explained:

> [T]he presumption of proper advice by counsel, which encompasses a presumption that the defendant has been informed correctly about his right to testify, will only be overcome, and a duty on the part of the trial court to take steps to make certain that the defendant is correctly advised of his rights will only arise, if **it becomes clear to the court** that the defendant does not

> understand the constitutional right that he is deciding to exercise or to waive. The defendant's state of mind alone does not obligate the trial court to intervene. Rather, the court must be placed on clear notice that the represented defendant does not understand his rights before such a duty will arise.

(Emphasis in original).

Here, unlike in *Hamilton*, appellant never expressly indicated that he did not understand his rights in this regard. Given that there was no express confusion, or incorrect advice, the presumption remained that appellant was properly advised of his rights by his attorney, and he elected to waive the right to testify.

To be sure, appellant made nonsensical comments. It was up to the circuit court to determine whether these comments were indicative of a lack of understanding of his rights or an attempt at faking mental illness for secondary gain, as Dr. Hendershot determined appellant was prone to do. We perceive no error in the circuit court's decision to accept appellant's waiver of the right to testify as knowing and voluntary.

III.

Appellant next contends that the commitment record must be corrected to accurately reflect the sentence imposed by the court. The State agrees, as do we.

At sentencing, the court indicated its intent to sentence appellant to a total of five years. Therefore, the court sentenced appellant as follows:

> For the second degree assault on Officer Ritz, the sentence is two and a half years in the Division of Correction, consecutive to any sentence you're now serving or obligated to serve. For the sentence . . . for the crime of second degree assault on Officer Finch, the sentence is also two and a half years in the Division of Correction consecutive to the two and half years for Officer Ritz, consecutive to any other sentence you're now serving or obligated to serve.

The docket entries and commitment record, however, reflect a sentence of three and a half years for the second degree assault on Officer Ritz and a consecutive sentence of two and a half years for the second degree assault on Officer Finch, for a total of six years. Ordinarily, when the docket entries and the transcript conflict, the transcript of the proceedings controls. *Savoy v. State*, 336 Md. 355, 360 n. 6 (1994). *Accord Potts v. State*, 231 Md. App. 398, 411 (2016) (correcting commitment record and docket entries to reflect sentence set forth in transcript); *Turner v. State*, 181 Md. App. 477, 491 (2008) ("When there is [] a discrepancy between the transcript and the docket entries, absent any evidence that there is error in the transcript, the transcript controls"). Accordingly, we shall order a limited remand with instructions to the circuit court to correct the commitment record and docket entries.

CASE REMANDED TO THE CIRCUIT COURT FOR WASHINGTON COUNTY TO CORRECT THE DOCKET ENTRIES AND COMMITMENT RECORD. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID BY APPELLANT.