

District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80306 (303) 441-3792	DATE FILED: March 13, 2023 4:42 PM
<p>THE PEOPLE OF THE STATE OF COLORADO</p> <p>v.</p> <p>AHMAD AL ALIWI ALISSA, DEFENDANT</p>	<p>▲ COURT USE ONLY ▲</p>
<p><i>Attorneys for People:</i> Michael Dougherty, Kenneth Kupfner, & Adam Kendall <i>Attorneys for Defendant:</i> Samuel Dunn, Kathryn Herold, & Daniel King</p>	<p>Case Number: 2021CR497</p> <p>Division 13 Courtroom G</p>
<p>ORDER RE: PEOPLE’S MOTION FOR COURT ORDER REGARDING ADDITIONAL INFORMATION RELATED TO DEFENDANT’S COMPETENCY, OR IN THE ALTERNATIVE, PEOPLE’S MOTION FOR RESTORATION HEARING (P-012) and PEOPLE’S SUPPLEMENTED AND AMENDED MOTION REGARDING ADDITIONAL INFORMATION RELATED TO DEFENDANT’S COMPETENCY (P-013)</p>	

THIS MATTER comes before the Court on the *People’s Motion for Court Order Regarding Additional Information Related to Defendant’s Competency, or in the Alternative, People’s Motion for Restoration Hearing (P-012)* (“Motion 1”) filed on January 26, 2023 and *People’s Supplemented and Amended Motion Regarding Additional Information Related to Defendant’s Competency (P-013)* (“Motion 2”) filed on February 2, 2023. Defense Counsel filed *Objection to P-012, and Request for an Order Prohibiting the Prosecution and/or CMHIP from Compelling Mr. Alissa to Undergo a Forensic Neuropsychological Evaluation, Video-Recorded or Otherwise [P-012]* (“Response”) on February 16, 2023. The People filed their *Reply in Support of the People’s Supplemented and Amended Motion Regarding Additional Information Related to Defendant’s Competency (P-013)* (“Reply”) on February 24, 2023. Having considered the pleadings and applicable law, the Court enters the following ORDERS:

I. BACKGROUND

On March 23, 2021, Defendant was arrested on the scene of a mass shooting at King Soopers grocery store in Boulder, Colorado. On March 24, 2021, Defendant was charged with ten counts of Murder in the First Degree and one count of Criminal Attempt to Commit Murder in the First Degree. On May 24, 2021, the People amended their Complaint by adding forty-six counts

of Criminal Attempt to Commit Murder in the First Degree (nineteen of those counts against peace officers), one count of Assault in the First Degree, ten counts of Large Capacity Magazine Prohibited – During Crime, and forty-seven counts of Crime of Violence (sentence enhancer).

On September 1, 2021, counsel for Defendant raised the issue of competency. After three competency evaluations performed by four separate psychologists, the Court found Defendant incompetent to proceed and committed Defendant to the custody and care of the Colorado Department of Human Services (“CDHS”). Defendant was transported to Colorado Mental Health Institute of Pueblo (“CMHIP”) for restoration treatment, where defendant remains today. Per statutory mandate, CMHIP has performed four competency re-evaluations, where CHDS continues to conclude that Defendant remains incompetent but finds Defendant is likely restorable to competency within the reasonably foreseeable future.

After review of CDHS’s reports and re-evaluations since the Court’s initial determination, the People are concerned that Defendant’s lack of participation in the restoration process may be voluntary. The People filed Motion 1 requesting a neuropsychological evaluation to determine whether Defendant’s failure to engage in the restoration process is in fact voluntary. In response to Motion 1, the Court held a hearing at which time the People moved to withdraw their motion as CMHIP had approved their request to bring in a board certified forensic neuropsychological expert to perform a neuropsychological evaluation. Defense Counsel objected to the withdrawal because Defendant’s constitutional rights would be violated by allowing the People’s expert to perform a neuropsychological evaluation and, further, questioned CMHIP’s authority to allow the People’s expert to perform said evaluation. The Court ordered the parties to brief the issues further.

II. ANALYSIS AND RULINGS

The Court shall address the People’s Motions in two parts: (1) whether the People can request and provide a neuropsychological evaluation of Defendant and/or whether the Court can prohibit CMHIP from authorizing such an evaluation; and (2) whether the People can request a Restoration Hearing. The Court shall address each in turn.

A. Neuropsychological Evaluation

In Motion 2, the People argue that their initial request in Motion 1 is moot after CMHIP agreed to let the People bring in their own expert to do a neuropsychological evaluation. Consequently, the People assert that the Court does not have the authority to prohibit CMHIP from allowing the People’s expert to perform an evaluation.

Applicable Law

A defendant’s competency to proceed with criminal proceedings is governed by Title 16, Article 8.5 of the Colorado Revised Statutes. After a court determines a defendant is incompetent

to proceed and the restoration process has begun, the Court does not have the authority to order competency evaluations. *People In Int. of B.B.A.M.*, 453 P.3d 1161, 1167, ¶¶ 26-27, (Colo. 2019) (analyzing C.R.S. § 19-2-1304(1), which has subsequently been repealed and replaced by § 19-2.5-703(1));¹ see also C.R.S. § 16-8.5-103(1)(a). Once a defendant is found incompetent, “decisions about the appropriate treatment [of an incompetent defendant] are within the discretion of [CMHIP] staff.” *Kort v. Carlson*, 723 P.2d 143, 149 (Colo. 1986). Pursuant to § 16-8.5-104(1), when a defendant is deemed incompetent to proceed and restoration treatment has begun,

. . . any claim by defendant to confidentiality or privilege is deemed waived, and the district attorney, the defense attorney, and the court are granted access, without written consent of the defendant or further order of the court, to:

- (a) Reports of competency evaluations, including second evaluations;
- (b) Information and documents relating to the competency evaluation that are created by, obtained by, reviewed by, or relied on by an evaluator performing a court-ordered evaluation; and
- (c) The evaluator, for the purpose of discussing the competency evaluation.

Further, “[n]othing in this section limits the court’s ability to order that information in addition to that set forth in subsections (1) and (3) of this section be provided to the evaluator, or to either party to the case, nor does it limit the information that is available after the written consent of the defendant.” § 16-8.5-104(4).

Findings of Fact and Conclusions of Law

The People argue neuropsychological evaluations are national standard practice in a situation when a person is potentially feigning or exaggerating symptoms. In November 2022, the People suggested a neuropsychological evaluation. When CMHIP informed the People that they no longer have a staff member qualified to perform such evaluations, the People offered to provide their own expert to perform the evaluation. The People represent that CMHIP decided the opinion of the People’s expert is information CMHIP is willing to consider in Defendant’s assessments.² The People argue that the only remedy available if the Court agrees with Defense Counsel’s objection is if the Court issues an order prohibiting CMHIP from allowing the People’s expert to

¹ The Court finds C.R.S. § 19-2.5-703(1) and § 16-8.5-103(1)(a) analogous to each other and therefore, the Court finds the analysis in *People In Int. of B.B.A.M.* appropriate in this case.

² The Court notes that in the email exchange between CMHIP and the People, CMHIP stated that Defendant’s doctors “have no concerns with [the People’s] office hiring a board certified forensic neuropsychologist to perform testing on Mr. Alissa. They would just ask that they have access to this individual, his/her report, and the raw testing data once available.” *Motion 2*, Ex. 2.

perform the evaluation. The People argue that the Court does not have the authority to issue such an order.

Defense Counsel argues that allowing the People's expert to evaluate Defendant would be a violation of Defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article II, sections 16, 18, 23, and 25 of the Colorado Constitution. Further, Defense Counsel argues that the Court, the People, nor CMHIP have the authority to compel Defendant to undergo such an evaluation. Defense Counsel argues that a neuropsychological evaluation will not provide the information the People want, and Defendant is unlikely to be able to even complete a neuropsychological evaluation due to his severe mental illness.

The Court finds that a neuropsychological evaluation after preliminary competency evaluations would be considered treatment of a defendant. As this is considered treatment of an individual undergoing restoration treatment, the Court finds this is under the sole purview of CMHIP. CMHIP's email simply allows the People to bring in its own qualified doctor to perform the test. CMHIP has not indicated that this is or should be part of Defendant's restoration treatment. The Court finds that CMHIP has not indicated whether this evaluation will be beneficial to their treatment of Defendant but, simply, that the doctors do not have concerns regarding the performance of the evaluation.

The Court agrees with the People that the Court does not have the authority to prohibit CMHIP from performing a neuropsychological evaluation. Although the People withdrew this request for relief from its amended motion, the Court agrees with Defense Counsel that the Court does not have the authority to order CMHIP to perform a neuropsychological evaluation. However, the Court finds that the People and Defense Counsel lack the same authority. Once Defendant was found incompetent (four qualified psychologists have now determined that Defendant is incompetent), CMHIP is solely responsible for Defendant's treatment. CMHIP has sole authority to determine the appropriate treatment for Defendant.

As the Court finds that only CMHIP has the authority, the Court finds it unnecessary to address Defense Counsel's constitutional concerns.

Ruling and Orders

Therefore, the Court finds that the Court, the People, and Defense Counsel lack the authority to dictate the treatment of Defendant during his restoration treatment. Therefore, the Court orders that the People shall not bring in their own board certified forensic neuropsychological expert to perform a neuropsychological evaluation on Defendant. However, if CMHIP is going to perform the neuropsychological evaluation on its own volition, the parties need to be in communication with CMHIP. The parties must inquire with CMHIP the timing of

said evaluation because any potential restoration hearing would need to be stayed until the completion of the evaluation.

B. Restoration Hearing

In the alternative, the People requested a Restoration Hearing.

Applicable Law

When a statute's language is "clear and unambiguous," the court gives "full effect to its plain meaning and look[s] no further." *Lewis v. Taylor*, 375 P.3d 1205, 1209 at ¶ 20 (Colo. 2016). Pursuant to § 16-8.5-113(1), "[t]he court may order a restoration hearing at any time on its own motion, on motion of the prosecuting attorney, or on motion of the defendant." The remaining subsections of § 16-8.5-113 govern the process for when CDHS or another approved restoration services provider determines a defendant had been restored to competency. C.R.S. § 16-8.5-113(2)-(6).

Findings of Fact and Conclusions of Law

If their expert cannot conduct an evaluation, the People request the Court order a restoration hearing. Defense Counsel argues that none of the experts have opined that Defendant is competent. Therefore, Defense Counsel argues that the Court lacks the authority to order a restoration hearing while Defendant is undergoing restoration therapy.

The Court finds § 16-8.5-113(1) clear and unambiguous which states the court or either party may request a restoration hearing at any time. The Court finds that this provision of the statute stands on its own and does not require a prior finding of Defendant's restoration to competency. The Court finds the remaining subsections in § 16-8.5-113 apply when a Defendant has been deemed competent after restoration.

However, the Court's granting of the request for a restoration hearing is within the discretion of the Court. The Court finds any party requesting a restoration hearing must have a good faith basis for the request. The Court finds interpreting the statute otherwise would run the risk of harassment of the parties and wasting judicial resources. The Court does not agree with Defense Counsel that a restoration hearing cannot be held while Defendant is undergoing restoration therapy because this is contrary to the clear and unambiguous language of § 16-8.5-113(1).

Ruling and Orders

In accordance with the Court's findings, the Court orders the People to file a supplemental briefing, providing an offer of proof for the basis for their request, within seven days of today's date. Defense Counsel shall have seven days from the filing of the supplemental briefing to file a Response. Once the Court receives said briefings, the Court shall determine how to proceed.

III. CONCLUSION

For the reasons set forth above, the Court finds the People lack authority to perform a neuropsychological evaluation on their own volition and the Court takes the People's request for a restoration hearing under ADVISEMENT until further briefing.

SO ORDERED: March 13, 2023.

BY THE COURT



Ingrid S. Bakke
District Court Judge